TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 368

GEMSCO, INC., ET AL., PETITIONERS,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR

No. 369

MILDRED MARETZO, ET AL., PETITIONERS,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR

No. 370

JOSEPHINE GUISEPPI, ET AL., PETITIONERS,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 18, 1944.

CERTIORARI GRANTED OCTOBER 16, 1944.

SUPREME COURT OF THE UNITED STATES

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1944

—4635

[fol. 1]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPHINE GUISEPPI, DOMINICA DE MARCO, ROSA MORICI, Anthony Cimilluca, individually and trading as Cimi Embroidery Co., Simon Federman, individually and trading as Efficiency Novelty Works and Frank Jannotti, individually and trading as Parisian Art Embroidery, on behalf of themselves and all persons, firms or corporations similarly aggrieved and situated who may intervene in this proceeding, Petitioners-Appellants,

against

L. METCALFE WALLING, as Administrator of the Wage and Hour Division, United States Department of Labor, Respondent

PETITION

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of Josephine Guiseppi, Dominica De Marco, Rosa Morici, Anthony Cimilluca, individually and trading as Cimi Embroidery Co., Simon Federman, individually and trading as Efficiency Novelty Works and Frank Jannotti, individually and trading as Parisian Art Embroidery, the Petitioners above named, respectfully alleges:

First: That at all times hereinafter mentioned, L. Metcalf Walling was and still is the duly constituted and appointed Administrator of the Wage and Hour Division, United States Department of Labor.

Second: That on or about the 6th day of June, 1942, pursuant to the provisions of the Fair Labor Standards [fol. 2] Act of 1938, as amended, said Administrator appointed Industry Committee No. 45 for the Embroideries Industry.

Third: That thereafter, the said Committee filed with the Administrator its recommendation for a minimum wage of 40¢ an hour.

Fourth: That thereafter, hearings were held upon the said recommendation, between the dates of November 2, 1942 and November 13, 1942, inclusive.

Fifth: That on or about the 2nd day of September, 1943, the Administrator issued a Wage Order, dated August 21, 1943, applying to the Embroideries Industry, as therein defined.

Sixth: That the said order, in addition to approving the Industry Committee's recommendation of a 40¢ minimum hourly rate, contained provisions prohibiting homework in the Embroideries Industry, except where performed by workers

(a) unable to work in factories, because of physical or mental disability, or

(b) unable to leave home because the worker's presence is required to care for an invalid at home.

and then, only upon special homework certificates issued by the Wage and Hour Division.

Seventh: That all of the Petitioners are engaged in the Embroideries Industry, as defined in the said order, either in the capacity of homeworkers, or as employers of homeworkers.

Eighth: That all of the Petitioners are aggrieved by those provisions of the order aforesaid as prohibit, restrict and regulate the performance of homework, in that said provisions prevent the Petitioners from pursuing and car- [fol. 3] rying on their present respective lawful occupation or business.

Ninth: Petitioners submit that those provisions of the order which prohibit, restrict and regulate homework should be set aside in toto, upon the following grounds, among others:

(a) The Administrator possesses only the powers conferred upon him by the Fair Labor Standards Act.

(b) The Fair Labor Standards Act does not contain, nor does it confer upon the Administrator the power or authority to prohibit, restrict or regulate homework.

(c) That in promulgating the provisions of the order complained of, the Administrator exceeded the authority and powers vested in him by the Act, and violated the intent and purposes thereof.

(d) That the provisions complained of are not supported by substantial evidence.

(e) That the provisions complained of are unreasonable, arbitrary and discriminatory against the Petitioners and those similarly situated.

(f) That the provisions complained of are unconstitutional, being in violation of the Constitution of the United States of America.

(g) That the foregoing objections were duly and timely made to the Administrator.

Tenth: That jurisdiction is conferred upon this Court, by the Fair Labor Standards Act of 1938, as amended.

Eleventh: That each of the Petitioners resides or has his principal place of business within the City of New York, and within the circuit of this Court.

[fol. 4] Wherefore, your Petitioners, being aggrieved by the order of the Administrator dated August 21, 1943, do hereby appeal from so much of said order as prohibits, restricts and regulates homework, and respectfully pray that said order be modified by setting aside those provisions thereof prohibiting, restricting and regulating homework.

Dated: October 19, 1943.

Josephine Guiseppi, Petitioner, Dominica De Marco, Petitioner, Rosa Morici, Petitioner, Anthony Cimilluca, Petitioner, Simon Federman, Petitioner, Frank Jannotti, Petitioner. Landau & Friedman, By: Solomon S. Friedman, Attorneys for Petitioners, Office & P. O. Address, 1440 Broadway, Borough of Manhattan, City of New York.

[fol. 5] State of New York,
County of New York—ss:

Josephine Guiseppi, being duly sworn, deposes and says, that she is one of the Petitioners herein and resides at 429 East 123rd Street, in the Borough of Manhattan, City and State of New York; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein

stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Josephine Guiseppi.

Sworn to before me this 19th day of October, 1943. Mildred Gerlack, Notary Public, Kings Co. Cert. filed New York Co. Commission expires March 30, 1945.

STATE OF NEW YORK,
County of Kings—ss:

DOMINICA DE MARCO, being duly sworn, deposes and says, that she is one of the Petitioners herein and resides at 1621 East 51st Street, in the Borough of Brooklyn, City and State of New York; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Dominica De Marco.

Sworn to before me this 19th day of October, 1943. Mildred Gerlack, Notary Public, Kings County. Commission expires Mar. 30, 1945.

[fol. 6] STATE OF NEW YORK,
County of Kings—ss:

ROSA MORICI, being duly sworn, deposes and says, that she is one of the Petitioners herein and resides at 1619 East 51st Street, in the Borough of Brooklyn, City and State of New York; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Rosa Morici.

Sworn to before me this 19th day of October, 1943. Mildred Gerlack, Notary Public, Kings Co. Comm. exp. Mar. 30, 1945.

STATE OF NEW YORK,
County of New York—ss:

ANTHONY CIMILLUCA, being duly sworn, deposes and says, that he is one of the Petitioners herein, and has his prin-

cipal place of business at 323 West 38th Street, in the Borough of Manhattan, City and State of New York, under the firm name and style of Cimi Embroidery Co.; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Anthony Cimilluca.

Sworn to before me this 19th day of October, 1943.
Mildred Gerlack, Notary Public, Kings Co. Cert. filed N. Y. Co. Comm. exp. Mar. 30, 1945.

[fol. 7] STATE OF NEW YORK,
County of New York, ss.:

SIMON FEDERMAN, being duly sworn, deposes and says, that he is one of the Petitioners herein, and has his principal place of business at 162 West 34th Street in the Borough of Manhattan, City and State of New York, under the firm name and style of Efficiency Novelty Works; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Simon Federman.

Sworn to before me this 19th day of October, 1943.
Mildred Gerlack, Notary Public, Kings Co. Cert. filed N. Y. Co. Comm. exp. Mar. 30, 1945.

STATE OF NEW YORK,
County of New York, ss.:

FRANK JANNOTTI, being duly sworn, deposes and says, that he is one of the Petitioners herein, and has his principal place of business at 2110 Third Avenue, in the Borough of Manhattan, City and State of New York, under the firm name and style of Parisian Art Embroidery; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to

the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Frank Jannotti.

Sworn to before me this 19th day of October, 1943. Mildred Gerlack, Notary Public, Kings Co. Cert. filed N. Y. Co. Comm. exp. Mar. 30, 1945.

[fol. 8] NOTICE OF APPEAL

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPHINE GUISEPPI, DOMINICA DE MARCO, ROSA MORICI, Anthony Cimilluca, individually and trading as Cimi Embroidery Co., Simon Federman, individually and trading as Efficiency Novelty Works and Frank Jannotti, individually and trading as Parisian Art Embroidery, on behalf of themselves and all persons, firms or corporations similarly aggrieved and situated who may intervene in this proceeding, Petitioners-Appellants,

against

L. METCALFE WALLING, as Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.

SIR:

Notice is hereby given, that Josephine Guiseppi, Dominica De Marco, Rosa Morici, Anthony Cimilluca, individually and trading as Cimi Embroidery Co., Simon Federman, individually and trading as Efficiency Novelty Works and Frank Jannotti, individually and trading as Parisian Art Embroidery, Petitioners-Appellants above-named, hereby appeal to the Circuit Court of Appeals, for the Second Circuit, from so much of the Wage Order dated August 21, 1943, made by L. Metcalfe Walling, as Administrator of the Wage and Hour Division, United States Department of Labor, as prohibits, regulates and restricts homework in

[fol. 9] the Embroideries Industry, as defined in the said Order.

Dated: October 19, 1943.

Landau & Friedman, by Solomon S. Friedman, Attorneys for Petitioners-Appellants, Office & P. O. Address, 1440 Broadway, Borough of Manhattan, City of New York.

To: L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, 165 West 46th Street, City of New York.

[fol. 10] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MILDRED MARETZO; MARY FRANKS; FRANCES GIACONE; SALVATORE CALTABIANO and Attilio Caltabiano, co-partners doing business under the firm name and style of Caltabiano Embroideries; Abraham Friedensohn and Isadore Friedensohn, co-partners doing business under the firm name and style of Public Art Embroidery; George Kaplan; Julius Brody, doing business under name and style of Brody Embroidery Co.; David Goldfarb doing business under the name and style of Decor Embroidery; Moe Meyerson, Perry Meyerson and Henry Meyerson, co-partners doing business under the firm name and style of Meyerson Brothers; Veil Dotters Association of America, Inc., on behalf of itself and all its members producing or manufacturing embroideries and embellishing veils; and Pleaters, Stitchers & Embroiderers Ass'n., Inc., on behalf of itself and all its members producing or manufacturing embroideries, Petitioners-Appellants,

against

L. METCALFE WALLING, Administrator, Wage and Hour Division, United States Department of Labor, Respondent.

PETITION AND NOTICE OF APPEAL

* * * * * * *

[fol. 11] *To the Honorable, the Judges of the United States Circuit Court of Appeals for the Second Circuit:*

The petitioners Mildred Maretzo, Mary Franks, Frances Giacone, Salvatore Caltabiano and Attilio Caltabiano, co-partners doing business under the firm name and style of [fol. 12] Caltabiano Embroideries, Abraham Friedensohn and Isadore Friedensohn, co-partners doing business under the firm name and style of Public Art Embroidery, George Kaplan, Julius Brody, doing business under name and style of Brody Embroidery Co., David Goldfarb doing business under the name and style of Decor Embroidery, and Moe Meyerson, Perry Meyerson and Henry Meyerson, co-partners doing business under the firm name and style of Meyerson Brothers, each for herself, himself, and itself; the petitioner Veil Dotters Association of America, Inc., on behalf of itself and all its members producing or manufacturing embroideries and embellishing veils; and the petitioner Pleaters, Stitchers & Embroiderers Ass'n., Inc., on behalf of itself and all its members engaged in manufacturing or producing embroideries, respectfully represent and allege:

I

Your petitioner Mildred Maretzo, resides at 353 85th Street, in the Borough of Brooklyn, City and State of New York, within this circuit, and procures, and at all the times hereinafter mentioned, has procured a livelihood by performing work on embroideries in your petitioner's home or residence.

II

Your petitioner Mary Franks, resides at 352 17th Street, in the Borough of Brooklyn, City and State of New York, within this Circuit, and procures, and at all the times hereinafter mentioned, has procured a livelihood by performing work on embroideries in your petitioner's home or residence.

III

Your petitioner Frances Giacone, resides at 3308 Bailey Avenue, in the Borough of Bronx, City and State of New York, within this circuit, and procures, and at all the times hereinafter mentioned, has procured a livelihood by performing work on embroideries in your petitioner's home or residence.

[fol. 13] IV

Your petitioners Salvatore Caltabiano and Attilio Caltabiano, co-partners doing business under the firm name and style of Caltabiano Embroideries, maintain and at all the times hereinafter mentioned, have maintained their principal and only place of business in the City, County and State of New York, within this circuit, and engage, and at all the times hereinafter mentioned, have engaged in the business of producing and manufacturing embroideries, a necessary and indispensable part of which business is the utilization by it of employees who perform work on embroideries in their own homes and residences.

V

Your petitioners Abraham Friedensohn and Isadore Friedensohn, co-partners doing business under the firm name and style of Public Art Embroidery, maintain and at all the times hereinafter mentioned, have maintained their principal and only place of business in the City, County and State of New York, within this circuit, and engage, and at all the times hereinafter mentioned, have engaged in the business of producing and manufacturing embroideries, a necessary and indispensable part of which business is the utilization by it of employees who perform work on embroideries in their own homes and residences.

VI

Your petitioner George Kaplan maintains and at all the times hereinafter mentioned, has maintained his principal and only place of business in the City, County and State of New York, within this circuit, and engages, and at all the times hereinafter mentioned, has engaged in the busi- [fol. 14] ness of producing and manufacturing embroideries, a necessary and indispensable part of which business is the utilization by him of employees who perform work on embroideries in their own homes and residences.

VII

Your petitioner, Julius Brody, doing business under name and style of Brody Embroidery Co., maintains and at all the times hereinafter mentioned, has maintained his principal and only place of business in the City, County and

State of New York, within this circuit, and engages, and at all the times hereinafter mentioned, has engaged in the business of producing and manufacturing embroideries, a necessary and indispensable part of which business is the utilization by it of employees who perform work on embroideries in their own homes and residences.

VIII

Your petitioner David Goldfarb doing business under the name and style of Decor Embroidery maintains and at all the times hereinafter mentioned, has maintained his principal and only place of business in the City, County and State of New York, within this circuit, and engages, and at all the times hereinafter mentioned, has engaged in the business of producing and manufacturing embroideries, a necessary and indispensable part of which business is the utilization by it of employees who perform work on embroideries in their own homes and residences.

[fol. 15] IX

Your petitioners Moe Meyerson, Perry Meyerson and Henry Meyerson, co-partners doing business under the firm name and style of Meyerson Brothers maintains and at all the times hereinafter mentioned, has maintained their principal and only place of business in the City, County and State of New York, within this circuit, and engages, and at all the times hereinafter mentioned, has engaged in the business of producing and manufacturing embroideries, a necessary and indispensable part of which business is the utilization by it of employees who perform work on embroideries in their own homes and residences.

X

Your petitioner Veil Dotters Association of America, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Petitioner maintains, and at all the times hereinafter mentioned has maintained offices at 1440 Broadway, in the City, County and State of New York, within this circuit.

Petitioner is a trade association whose members are engaged in the business of producing and manufacturing embroideries of various kinds and the embellishing of veils and who, in the course of such business, necessarily must

employ persons who perform work in their homes or residences.

This petition is made by your petitioner, Veil Dotters Association of America, Inc., for itself and its members engaged in the business of producing or manufacturing and embellishing or in any manner, working on embroideries and veils, all of which members have their places of business within this circuit.

[fol. 16]

XI

Your petitioner Pleaters, Stitchers & Embroiderers Ass'n., Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Petitioner maintains, and at all the times hereinafter mentioned has maintained offices at 1440 Broadway, in the City, County and State of New York, within this circuit.

Petitioner is a trade association consisting of about three hundred members, approximately sixty-six of which are engaged in the business of producing and manufacturing embroideries of various kinds and who, in the course of such business, necessarily must employ persons who perform work in their homes or residences.

This petition is made by your petitioner, Pleaters, Stitchers & Embroiderers Ass'n., Inc., for itself and its members engaged in the business of producing or manufacturing, or in any manner, working on embroideries, all of which members have their places of business within this circuit. The names and addresses of some of its members, all in the City of New York, are appended hereto as Exhibit "A" and are made a part hereof.

XII

Upon information and belief, on or about June 6th, 1942, the Administrator of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, C. 676, 75th Congress, 3rd Session, 52 Stat. 1060, 29 U. S. Code, Sections 201-219) allegedly acting pursuant to the said Fair Labor Standards Act of 1938, appointed Industry Committee #45 for the embroideries industry and directed the committee to recommend minimum wage rates for the embroideries industry.

[fol. 17] XIII

Upon information and belief, on or about June 30th, 1942, the aforementioned Industry Committee appointed by the Administrator of the Fair Labor Standards Act for the embroideries industry, filed with the Administrator a report recommending a minimum wage rate of 40¢ an hour in the embroideries industry.

XIV

Upon information and belief, from on or about November 2nd, 1942, and to on or about November 13th, 1942, a hearing was allegedly held before a hearing officer designated by the Administrator of the Fair Labor Standards Act upon the aforementioned recommendation of Industry Committee #45 for the embroideries industry, and upon the question of the prohibition, restriction or regulation of homework in the embroideries industry.

Those proceedings were entitled:

> "United States Department of Labor Wage & Hour and Public Contracts Divisions
>
> In the Matter of:
>
> Hearing on the Minimum Wage Recommendations of Industry Committee No. 45 for the Embroideries Industry and the Prohibition, Restriction, or Regulation of Homework in the Industry."

XV

Upon information and belief, oral argument was heard by L. Metcalfe Walling, Administrator, Wage and Hour Division, U. S. Department of Labor, respondent above [fol. 18] described, on or about January 26th, 1943, upon the record, of the proceedings described in paragraph XIV herein.

XVI

Upon information and belief, on or about the 2nd day of September, 1943, there appeared in the Federal Register an order of L. Metcalfe Walling, Administrator, Wage and Hour Division, U. S. Department of Labor, approving and adopting the minimum wage rate recommended by Industry Committee #45 for the embroideries industry and further

ordering such restriction and limitation of homework in the embroideries industry as to amount to a prohibition of such work.

XVII

The within petition is necessitated by reason of the order of L. Metcalfe Walling, Administrator, Wage and Hour Division, U. S. Department of Labor, described in paragraph XVI herein which, in effect, prohibited homework in the embroideries industry. Petitioners' request and petition for a review herein is limited to such portion of the Administrator's order and is not directed against that portion of the Administrator's order approving the recommendation of Industry Committee #45 for the embroideries industry to the effect that a minimum wage rate of 40¢ an hour be paid in the embroideries industry.

Each and every one of your petitioners herein are aggrieved by the aforementioned order of L. Metcalfe Walling, Administrator, Wage and Hour Division, U. S. Department of Labor.

XVIII

By section 210 (a) of title 29, U. S. C. A., jurisdiction is vested in this court to review an order of the Adminis-
[fol. 19] trator, Wage and Hour Division, U. S. Department of Labor, issued in such manner as the order of the Administrator described in paragraph XVI above has been issued, upon the petition of any aggrieved person residing or having its principal place of business within this circuit.

XIX

The order of the Administrator, Wage and Hour Division, U. S. Department of Labor, hereinabove described insofar as it restricts and regulates work in homes and virtually prohibits homework in the embroideries industry is arbitrary, illegal, null, void, improper, and unconstitutional in that the Fair Labor Standards Act of 1938 does not give the Administrator the power to so order as to homework, and is an unlawful assumption by the Administrator of congressional powers and functions, and should be set aside.

In addition, so much of the said order as restrictively regulates and virtually prohibits homework in the embroideries industry is erroneous, arbitrary, contrary to law, contrary to evidence and not supported by the evidence adduced at the hearing and should be set aside.

Wherefore, your petitioners being aggrieved by the above mentioned order of L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, hereby respectfully petition that said orders be set aside insofar as it prohibits, restricts, and regulates homework in the embroideries industry and virtually prohibits homework in the embroideries industry.

[fol. 20] Dated, New York, October 20th, 1943.

Mildred Maretzo, Mary Franks, Frances Giacone, Caltabiano Embroideries, by Salvatore Caltabiano, Partner; Public Art Embroidery, by Abraham Friedensohn, Partner; George Kaplan; Brody Embroidery Co., by Julius Brody; Decor Embroidery, by David Gildford, Proprietor; Meyerson Brothers, by Perry Meyerson, Partner; Veil Dotters Association of America Inc., by Barrett W. Landon, Execu-
[fol. 21] tive Director; Pleaters, Stitchers & Embroiderers Ass'n. Inc., by Jack Orloff, President; Brower, Brill & Tompkins, Attorneys for Petitioners-Appellants, Office & P. O. Address, 165 Broadway, New York City.

To: Hon. L. Metcalfe Walling, Administrator, Wage & Hour Division, United States Department of Labor, New York, N. Y.

[fol. 22] State of New York,
County of —, ss:

Mildred Maretzo, being duly sworn, deposes and says that she is a petitioner in the within action, that she has read and knows the contents of the foregoing petition and that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

—— ——.

Sworn to before me this 20th day of October, 1943.

State of New York,
County of ——, ss:

Mary Franks, being duly sworn, deposes and says that she is a petitioner in the within action, that she has read and knows the contents of the foregoing petition and that the

same is true to her own knowledge, except as to the matters therein stated to be alleged on information and believ, and that as to those matters she believes it to be true.

——— ———.

Sworn to before me this 20th day of October, 1943.

[fol. 23] STATE OF NEW YORK,
County of —, ss:

Frances Giacone, being duly sworn, deposes and says that she is a petitioner in the within action, that she has read and knows the contents of the foregoing petition and that the same is true to her own knowledge, except as to the matters herein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

——— ———.

Sworn to before me this 20th day of October, 1943.

STATE OF NEW YORK,
County of New York, ss:

Salvatore Caltabiano, being duly sworn, deposes and says that he is one of the partners of the co-partnership Caltabiano Embroideries, a petitioner in the within action and that he has read and knows the contents of the foregoing petition and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Salvatore Caltabiano.

Sworn to before me this 20th day of October, 1943. Abraham Gelb, Comm. of Deeds, City of N. Y. N. Y. Co. Clks. No. 14, Reg. No. 4 G 4. Kings Co. Clks. No. 46, Reg. No. 4005. Commission Expires Jan. 20, 1944.

[fol. 24] STATE OF NEW YORK,
County of New York, ss:

Abraham Friedensohn, being duly sworn, deposes and says that he is one of the partners of the co-partnership Public Art Embroidery, a petitioner in the within action, and that he has read and knows the contents of the fore-

going petition and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Abraham Friedensohn.

Sworn to before me this 20th day of October, 1943. Abraham Gelb, Comm. of Deeds, City of N. Y. N. Y. Co. Clks. No. 14, Reg. No. 4 G 4. Kings Co. Clks. No. 46, Reg. No. 4005. Commission Expires Jan. 20, 1944.

STATE OF NEW YORK,
County of New York, ss:

George Kaplan, being duly sworn, deposes and says that he is a petitioner in the within action, that he has read and knows the contents of the foregoing petition that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

George Kaplan.

Sworn to before me this 20th day of October, 1943. Abraham Gelb, Comm. of Deeds, City of N. Y. N. Y. Co. Clks. No. 14, Reg. No. 4 G 4. Kings Co. Clks. No. 46, Reg. No. 4005. Commission Expires Jan. 20, 1944.

[fol. 25] STATE OF NEW YORK,
County of New York, ss:

Julius Brody, being duly sworn, deposes and says that he is a petitioner in the within action, that he has read and knows the contents of the foregoing petition; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Julius Brody.

Sworn to before me this 20th day of October, 1943. Abraham Gelb, Comm. of Deeds, City of N. Y. N. Y. Co. Clks. No. 14, Reg. No. 4G4. Kings Co. Clks. No. 46, Reg. No. 4005. Commission expires Jan. 20, 1944.

STATE OF NEW YORK,
County of New York, ss:

David Goldfarb, being duly sworn, deposes and says that he is a petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

David Goldfarb.

Sworn to before me this 20th day of October, 1943. Abraham Gelb, Comm. of Deeds, City of N. Y. N. Y. Co. Clks. No. 14, Reg. No. 4G4. Kings Co. Clks. No. 46, Reg. No. 4005. Commission expires Jan. 20, 1944.

[fol. 26] STATE OF NEW YORK,
County of New York, ss:

Perry Meyerson, being duly sworn, deposes and says that he is one of the partners of Meyerson Brothers, a petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Perry Meyerson.

Sworn to before me this 20th day of October, 1943. Abraham Gelb, Comm. of Deeds, City of N. Y. N. Y. Co. Clks. No. 14, Reg. No. 4G4. Kings Co. Clks. No. 46, Reg. No. 4005. Commission expires Jan. 20, 1944.

STATE OF NEW YORK,
County of New York, ss:

Barnet Landau, being duly sworn, deposes and says that he is the executive director of Veil Dotters Association of America Inc., a petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the petitioner is because the said petitioner is a domestic corporation and deponent an officer thereof, to wit, its executive director.

Barnet Landau.

Sworn to before me this 20th day of October, 1943. Abraham Gelb, Comm. of Deeds, City of N. Y. N. Y. Co. Clks. No. 14, Reg. No. 4G4. Kings Co. Clks. No. 46, Reg. No. 4005. Commission expires Jan. 20, 1944.

[fol. 27] State of New York,
County of New York, ss:

Jack Orloff, being duly sworn, deposes and says that he is the president of the Pleaters, Stitchers & Embroiderers Ass'n., Inc., a petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the petitioner is because the said petitioner is a domestic corporation and deponent an officer thereof, to wit, its president.

Jack Orloff.

Sworn to before me this 20th day of October, 1943. Abraham Gelb, Comm. of Deeds, City of N. Y. N. Y. Co. Clks. No. 14, Reg. No. 4G4. Kings Co. Clks. No. 46, Reg. No. 4005. Commission expires Jan. 20, 1944.

[fol. 28] Exhibit A

Able Embroidery Corp., 234 West 39th St.*
Algy Trimming Co., Inc., 212 W. 29 St.
Amelia Art Embroidery, 250 West 40th St.
Annette Embroidery Co., Inc., 270 West 39th St.
Apex Embroidery Co., Inc., 329 West 39th St.
Art Scalloping & Emb. Co., 553 Eighth Ave.

* All addresses are in the City of New York.

Bauer Embroidery Co., Inc., 243 W. 39 St.
Edward E. Berger, Inc., 251 West 36th St.
Bijou Embroidery Corp., 270 West 38th St.
Brody Embroidery Co., 241 W. 36 St.
Bratman Brothers, 838 Sixth Ave.
Brody Embroidery Co., 241 West 36th St.
Burtan Embroidery Novelty Co., 325 West 37th St.
Caltabiano Embroideries, 575 Eighth Ave.
Colonial Embroidery Co., Inc., 320 West 37th St.
Columbia Embroidery Works, 315 West 36th St.
Continental Hand Drawn Works, Inc., 256 West 38th St.
Dainty Emb. & Stchg. Co., Inc., 307 West 38th St.
Davcoe Embroidery, Inc., 589 Eighth Ave.
Decor Embroidery, 250 West 40th St.
Du Rite Pltg. & Stchg. Co., 209 West 38th St.
Elite Embroidery Works, Inc., 323 West 39th St.
Phil Finkelstein Emb. Co., Inc., 234 West 39th St.
Frances Novelty Co., Inc., 535 Eighth Ave.
Frank & Kaye, Inc., 344 West 38th St.
Geller Scall. & Novelty Co., Inc., 307 West 38th St.
Hauser Embroidery Works, 264 West 40th St.
Albert Iannone Embroidery, 260 West 39th St.
[fol. 29] Industrial Stchg. Co., 29 West 38th St.
Iris Novelty Co., 159 West 27th St.
J. R. Novelty Co., 25 West 38th St.
Jay-Cee Embroidery Co., 336 West 37th St.
George Kaplan, 57 West 38th St.
J. M. Kleinman Co., 265 West 40th St.
Kramer Embroideries, 256 West 38th St.
L. S. Embroidery Co., 64 West 23rd St.
La Gene Embroidery Co., Inc., 218 West 34th St.
La Penne Embroidery Co., 323 West 39th St.
Lily Embroidery Works, Inc., 264 West 40th St.
Meyerson Brothers, 48 West 37th St.
Modern Pleating Co., 330 West 38th St.
New Embroidery Co., Inc., 264 West 40th St.
Oreol Embroidery Co., Inc., 307 West 38th St.
Orloff Sons, 48 West 38th St.
Pastore Emb. Co., 355 West 36th St.
Charles Paul Emb. Works, 158 West 27th St.
Public Art Embroidery, 29 West 38th St.
Regal Art Novelty Co., 263 West 40th St.
Roman Art Emb. Co., 112 West 30th St.

Rite Capital Pltg. & Stchg. Co., 230 West 39th St.
Dino Rossini, 545 Eighth Ave.
Mme. Sabo, Inc., 341 West 38th St.
Senate Emb. Works, Inc., 315 West 36th St.
Silver Emb. Works, 257 West 39th St.
Star Pltg. Corp., 575 Eighth Ave.
H. Stein, 323 West 39th St.
Oscar Stern, Inc., 307 West 38th St.
[fol. 30] Surprise Art Embroidery Co., Inc., 519 Eighth Ave.
Service Trading Corp., 257 West 38th St.
Thomasian Emb. Co., 330 West 38th St.
Trimore Embroidery Co., 336 West 37th St.
Van-Mar Emb. Co., 118 West 27th St.
Vogue Pltg. & Emb. Co., 313 West 37th St.
F. Wilkes Embroidery, 62 West 47th St.
Worth Pltg. & Stchg. Co., Inc., 209 West 38th St.
I. Zable, 270 West 38th St.

[fol. 31] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MILDRED MARETZO; MARY FRANKS; FRANCES GIACONE; SALVATORE CALTABIANO and ATTILIO CALTABIANO, co-partners doing business under the firm name and style of Caltabiano Embroideries; ABRAHAM FRIEDENSOHN and ISADORE FRIEDENSOHN, co-partners doing business under the firm name and style of Public Art Embroidery; GEORGE KAPLAN; JULIUS BRODY, doing business under name and style of BRODY EMBROIDERY CO.; DAVID GOLDFARB doing business under the name and style of DECOR EMBROIDERY; MOE MEYERSON, PERRY MEYERSON and HENRY MEYERSON, co-partners doing business under the firm name and style of MEYERSON BROTHERS; VEIL DOTTERS ASSOCIATION OF AMERICA, INC., on behalf of itself and all its members producing or manufacturing embroideries and embellishing veils; and PLEATERS, STITCHERS & EMBROIDERERS ASS'N., INC., on behalf of itself and all its members producing or manufacturing embroideries, Petitioners-Appellants,

against

L. METCALFE WALLING, Administrator, Wage and Hour Division, United States Department of Labor, Respondent.

NOTICE OF APPEAL

SIR:

Notice is hereby given that Mildred Maretzo, Mary Franks, Frances Giacone, Salvatore Caltabiano and Attilio Caltabiano, co-partners doing business under the firm name and style of Caltabiano Embroideries, Abraham Frieden- [fol. 32] sohn and Isadore Friedensohn, co-partners doing business under the firm name and style of Public Art Embroidery, George Kaplan, Julius Brody, doing business under name and style of Brody Embroidery Co., David Goldfarb doing business under the name and style of Decor Embroidery, Moe Meyerson, Perry Meyerson and Henry Meyerson, co-partners doing business under the firm name and style of Meyerson Brothers, Veil Dotters Association of America, Inc., on behalf of itself and all its members producing or manufacturing embroideries and embellishing veils, and Pleaters, Stitchers & Embroiders Ass'n., Inc. on behalf of itself and all its members producing or manu-

facturing embroideries, petitioners-appellants above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit from the order of L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, appearing in the Federal Register on or about the 2nd day of September, 1943, insofar as the said order restricts homework in the embroideries industry.

Dated, New York, October 20th, 1943.

Yours, etc. Brower, Brill & Tompkins, Attorneys for Petitioners-Appellants, Office & P. O. Address, 165 Broadway, Borough of Manhattan, City of New York.

To: Hon. L. Metcalfe Walling, Administrator, Wage & Hour Division, United States Department of Labor, New York, N. Y.

[fol. 33] PETITION FOR REVIEW

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

GEMSCO, INC., VANGUARD MILITARY EQUIPMENT CO., S. MARS, INC., HERTZ & COMPANY, TUBELL & COMPANY, HILBORN-HAMBURGER, INC. and G. HIRSCH SONS, INC., Petitioners,

against

L. METCALFE WALLING, Administrator of Wage and Hour Division, United States Department of Labor, Respondent

To the Honorable, the Judges of the Second Circuit:

Comes now, Gemsco, Inc., Vanguard Military Equipment Co., S. Mars, Inc., Hertz & Company, Tubell & Company, Hilborn-Hamburger, Inc., and G. Hirsch Sons, Inc., on behalf of themselves, and the respective successors of each of the foregoing, and of each and every officer, director and partner thereof, all with the same force and effect as if all of the said petitioners were specifically named herein, and petition this Honorable Court to review and set aside as to all of the petitioners, the order of Hon. L. Metcalfe Walling, Administrator of Wage and Hour Division, restricting and prohibiting industrial home work, which order

is dated the 21st day of August, 1943, and was filed September 1, 1943 and is hereinafter referred to as the "order of the Administrator".

In support of the petition, the following is shown to this Honorable Court:

[fol. 34] I

That your petitioners are engaged in the hereinafter described business and have their principal places of business in the City, County and State of New York, within the Second Circuit of the United States Circuit Court of Appeals.

The names and addresses of the petitioners are as follows:

Gemsco, Inc., 395—4th Avenue;
Vanguard Military Equipment Co., 135 Madison Avenue;
S. Mars, Inc., 65—4th Avenue;
Hertz & Company, 753 Broadway;
Tubell & Company, 25 Waverly Place;
Hilborn-Hamburger, Inc., 15 East 26th Street;
G. Hirch Sons, Inc., 119 West 40th Street;

That at the time of the hearings hereinafter mentioned, your petitioners were and still are engaged in the business of manufacturing separate and independent articles, namely, military insignia, emblems and devices upon which insignia, emblems and devices bullion embroidery work is applied by the above petitioners who manufacture the said articles.

II

Under the authority of Section 10 of the Fair Labor Standards Act of 1938 (Title 29 of the United States Code, Section 210) the United States Court of Appeals for the Second Circuit has jurisdiction of the parties and the subject matter herein involved and to give the relief prayed for in this petition.

III

On June 6, 1942, by Administrative Order No. 145, the Administrator, pursuant to Sections 5 and 8 of the Fair [fol. 35] Labor Standards Act of 1938 (Title 29 of the United States Code, Sections 205 and 208) appointed In-

dustry Committee #45 for the embroideries industry and directed the said Committee to recommend minimum wage rates for the embroaderies industry. On June 30, 1942, said Industry Committee #45 filed its report with the Administrator, recommending a minimum wage rate of forty cents an hour in the embroideries industry. No recommendation whatsoever was contained in the said Committee's report relative to any restriction, regulation or prohibition of home work by employees engaged in the said industry.

On November 2, 1942, public hearings were held before Major Robert N. Campbell, the presiding officer designated by Hon. L. Metcalfe Walling, Administrator of Wage and Hour Division (hereinafter referred to as "Administrator"), which public hearings were held pursuant to a notice previously published by the Administrator reciting that the purpose of the hearing was to take evidence on the following questions:

1. Whether the recommendation of Industry Committee No. 45 should be approved or disapproved.

2. In the event an order is issued approving the recommendation, what, if any, prohibition, restriction, or regulation of home work in this industry is necessary to carry out the purpose of such order, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate established therein.

IV

At the outset of the above mentioned public hearings of the Administrator, the parties appearing thereat openly consented to the issuance of an order establishing the minimum wage rate recommended by said Industry Committee as the minimum wage rate for said industry leaving for determination only the question as to whether any order could or should be issued by the said Administrator restricting, regulating or prohibiting industrial home work in the said industry.

[fol. 36] V

At the opening and at the close of the above mentioned public hearings, motions were made on behalf of the peti-

tioners herein to dismiss the hearing with respect to them on various grounds including the following:

1. That the Fair Labor Standards Act of 1938 does not authorize the Administrator to restrict and prohibit industrial home work.

2. That the uncontradicted evidence conclusively established that the industry in which the petitioners are engaged in was not included in the definition of the Embroideries Industry as established and promulgated by the Administrator.

3. That by the terms of the Statute, the Administrator was limited to accepting or rejecting the recommendations of the said Industry Committee, which recommendations did not include any reference to the performance of home work by employees engaged in the Embroideries Industry.

The Presiding Officer overruled the motions on the ground that he had no authority to dismiss the proceedings.

VI

On or before January 19, 1943, the petitioners herein filed a brief in support of their contentions and on the 26th day of January, 1943, pursuant to notice of hearing previously issued, oral argument was held before Hon. L. Metcalfe Walling, Administrator, at which hearing, counsel for petitioners appeared and presented argument in support of their contentions as set forth in their brief.

VII

Thereafter and on August 21, 1943, the Administrator signed an order which was thereafter filed on September [fol. 37] 1, 1943, restricting and substantially prohibiting industrial home work in the Embroideries Industry, and setting forth that his decision was contained in an opinion entitled "Findings and Opinion of the Administrator In the Matter of the Recommendation of Industry Committee #45 for a Minimum Wage Rate in the Embroideries Industry and industrial home work in the Embroideries Industry". The order further stated that a copy of said Findings and Opinion might be had upon request at the Wage and Hour Division, United States Department of Labor, 165 West 46th Street, New York, New York. Al-

though the petitioners by their attorneys have made repeated requests at the place indicated in the order, both in person and by mail, and at the main office of the Administrator at Washington, D. C., for a copy of the said Findings and Opinion, no copy of the said Findings and Opinion has been forthcoming from the said Wage and Hour Division to date hereof.

VIII

The order of the Administrator, among other things, provided for the adoption of the Industry Committee's recommendations establishing a forty cent per hour minimum wage rate to be paid by every employer to each of his employees in the Embroideries Industry and restricted industrial home work to the care of a worker who, because of age or physical or mental disability is unable to adjust himself or herself to factory work, or whose presence in the home is required because of the necessity of caring for an invalid. This restriction is tantamount to almost total prohibition.

IX

The order of the Administrator defines Embroideries Industry as follows:

> [fol. 38] "The production of all kinds of hand and machine-made embroideries and ornamental stitchings, including, but not by way of limitation, tucking, shirring, smocking, hemstitching, hand rolling, fagoting, Bonnaz embroidery, appliqueing, crochet beading, hand drawing, machine drawing, rhinestone trimming, sequin trimming, spangle trimming, eyelets, passementerie, pleating, the application of rhinestones and nailheads, stamping and perforating of designs, Schiffli embroidery and laces, burnt-out laces and velvets, Swiss hand-machine embroidery, thread splitting, embridery thread cutting, scallop cutting, lace cutting, lace making-up, making-up of embroidered yard goods, straight cutting of embroidery and cutting out of embroidery, embroidery trimmings, bindings (not made in textile establishments), pipings and emblems: *Provided, however*, That (1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or

other article, and (2) the manufacture of covered buttons and buckles, shall not be included."

The aforesaid order of the Administrator dated the 21st day of August, 1943, and filed on the 1st day of September, 1943, is erroneous in fact and in law and ought to be reviewed and set aside by this Honorable Court for the following reasons:

1. That the A lministrator failed to grant the petitioners' motion to dismiss the case at the conclusion of the hearings.

2. That the Administrator had no authority under the Fair Labor Standards Act of 1938 to prohibit, or to restrict industrial home work.

3. That the order of the Administrator is unsupported by findings of fact.

[fol. 39] 4. That the Administrator failed to find in accordance with the proof that the petitioners were maanufacturers of military and naval insignia devices as separate articles upon which their operations were performed and which were excluded by the definition of Embroideries Industry as set forth in Administrative Order #145 and in the order of the Administrator.

5. That the said order of the Administrator exceeded the authority of the Administrator under Section 8 of the Fair Labor Standards Act of 1938 in that it was not confined to an approval or disapproval of Industry Committee #45, which recommendations did not include any restriction of industrial home work.

6. That the evidence adduced at the hearings clearly established that under the Fair Labor Standards Act of 1938: (a) The restriction of industrial home work was and is not necessary to safeguard the minimum wage rate established by the said order of the Administrator since no evasion of the Minimum Wage Order on the part of the petitioners was proven; and (b) Such restriction of industrial home work would substantially curtail employment in the industry.

Wherefore, for the reasons aforesaid, the decision and order of the Administrator, dated the 21st day of August,

1943, and filed on the 1st day of September, 1943, are erroneous and without basis in law and fact and the petitioners pray that the said Administrator be required to certify and file in this Court a transcript of the record of the proceedings before it together with all the original exhibits introduced in evidence by the parties to the proceedings and that upon the filing of such transcript and exhibits, this Court shall proceed forthwith as provided by law to review such decision and order and set aside and dismiss, as against the petitioners herein, such parts of the [fol. 40] said order as restrict, regulate and prohibit industrial home work.

Dated, New York, October 20th, 1943.

Gemsco, Inc., by Irving Gordon, Treas.; Vanguard Military Equipment Co., by Mack Gershen, Partner; S. Mars, Inc., by S. Mars, Pres.; Hertz & Company, by Max Hertz, Tubell & Company, by Nathan Tubell, Partner; Hilborn-Hamburger, Inc., by J. M. Hilborn, Pres.; G. Hirsch Sons, Inc., by Morton T. Hirsch, Treas., Petitioners. Weisman, man, Quinn, Allan & Spett, by Samuel A. Allan, a Member of the F-rm, Attorneys for Petitioners, Office & P. O. Address, 1450 Broadway, Borough of Manhattan, City of New York.

[fol. 41] STATE OF NEW YORK,
City of New York,
County of New York, ss:

Irving Gordon, being duly sworn, deposes and says that he is the Treasurer of Gemsco, Inc., the corporation named in the within entitled proceeding and one of the Petitioners therein; that he has read the foregoing Petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the Gemsco, Inc. is because

the said Gemsco, Inc. is a New York corporation, and deponent an officer thereof, to wit, its Treasurer.

Irving Gordon.

Sworn to before me, this 20th day of October, 1943. Samuel Goldberg, Notary Public, Queens Co. No. 845, Reg. No. 547. Cert. Filed in N. Y. Co. No. 266, Reg. No. 4G146. Commission Expires March 30, 1944. (Seal.)

[fol. 42] State of New York,
City of New York,
County of New York, ss:

Mack Gershen, being duly sworn, deposes and says that he is a member of the firm of Vanguard Military Equipment Co., one of the Petitioners in the within proceeding; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Mack Gershen.

Sworn to before me, this 20th day of October, 1943. Samuel Goldberg, Notary Public, Queens Co. No. 845, Reg. No. 547. Cert. Filed in N. Y. Co. No. 266, Reg. No. 4G146. Commission Expires March 30, 1944. (Seal.)

[fol. 43] State of New York,
City of New York,
County of New York, ss:

S. Mars, being duly sworn, deposes and says that he is the President of S. Mars, Inc., the corporation named in the within entitled proceeding and one of the Petitioners therein; that he has read the foregoing Petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be

alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the S. Mars, Inc. is because the said S. Mars, Inc. is a New York corporation, and deponent an officer thereof, to wit, its President.

S. Mars.

Sworn to before me, this 20th day of October, 1943. Samuel Goldberg, Notary Public, Queens Co. No. 845, Reg. No. 547. Cert. Filed in N. Y. Co. No. 266, Reg. No. 4G146. Commission Expires March 30, 1944. (Seal.)

[fol. 44] State of New York,
City of New York,
County of New York, ss:

Max Hertz, being duly sworn, deposes and says that he is a member of the firm of Hertz & Company, one of the Petitioners in the within proceeding; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Max Hertz.

Sworn to before me, this 20th day of October, 1943. Samuel Goldberg, Notary Public, Queens Co. No. 845, Reg. No. 547. Cert. Filed in N. Y. Co. No. 266, Reg. No. 4G146. Commission Expires March 30, 1944. (Seal.)

[fol. 45] State of New York,
City of New York,
County of New York, ss:

Nathan Tubell, being duly sworn, deposes and says that he is a member of the firm of Tubell & Company, one of the Petitioners in the within proceeding; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Nathan Tubell.

Sworn to before me, this 20th day of October, 1943. Samuel Goldberg, Notary Public, Queens Co. No. 845, Reg. No. 547. Cert. Filed in N. Y. Co. No. 266, Reg. No. 4G146. Commission Expires March 30, 1944. (Seal.)

[fol. 46] State of New York,
City of New York,
County of New York, ss:

J. M. Hilborn, being duly sworn, deposes and says that he is the President of Hilborn-Hamburger, Inc., the corporation named in the within entitled proceeding and one of the Petitioners therein; that he has read the foregoing Petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the Hilborn-Hamburger, Inc. is because the said Hilborn-Hamburger, Inc. is a New York corporation, and deponent an officer thereof, to wit, its President.

J. M. Hilborn.

Sworn to before me, this 20th day of October, 1943. Samuel Goldberg, Notary Public, Queens Co. No. 845, Reg. No. 547. Cert. Filed in N. Y. Co. No. 266, Reg. No. 4G146. Commission Expires March 30, 1944. (Seal.)

[fol. 47] State of New York,
City of New York,
County of New York, ss:

Morton T. Hirsch, being duly sworn, deposes and says that he is the Treasurer of G. Hirsch Sons, Inc., the corporation named in the within entitled proceeding and one of the Petitioners therein; that he has read the foregoing Petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the G. Hirsch Sons, Inc.

is because the said G. Hirsch Sons, Inc. is a New York corporation, and deponent an officer thereof, to wit, its Treasurer.

Morton T. Hirsch, Treas.

Sworn to before me, this 20th day of October, 1943. Samuel Goldberg, Notary Public, Queens Co. No. 845, Reg. No. 547. Cert. Filed in N. Y. Co. No. 266, Reg. No. 4G146. Commission Expires March 30, 1944. (Seal.)

[fol. 48] NOTICE OF APPEAL

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

GEMSCO, INC., VANGUARD MILITARY EQUIPMENT CO., S. MARS, INC., Hertz & Company, Tubell & Company, Hilborn-Hamburger, Inc. and G. Hirsch Sons, Inc., Petitioners,

against

L. METCALFE WALLING, Administrator of Wage and Hour Division, United States Department of Labor, Respondent

Notice is hereby given that the above named petitioners appeal from such parts of the order of L. Metcalfe Walling, Administrator of Wage and Hour Division, United States Department of Labor, dated the 21st day of August, 1943 and filed on the 1st day of September, 1943, as restricts, regulates and prohibits industrial homework in the embroideries industry, said appeal being taken to the United States Circuit Court of Appeals for the Second Circuit.

Dated, N. Y., Oct. 22, 1943.

Yours, etc., Weisman, Quinn, Allan & Spett, by Samuel S. Allan, A Member of the Firm, Attorneys for Petitioner, Office & P. O. Address, 1450 Broadway, Borough of Manhattan, City of New York.

[fol. 49] To: L. Metcalfe Walling, Esq., Administrator Wage & Hour Division, United States Department of Labor, 165 West 46th Street, New York City. Kenneth Meikeljohn, Esq., Solicitor, U. S. Department of Labor, 165 West 46th Street, New York City.

[fol. 33] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

GEMSCO, INC., VANGUARD MILITARY EQUIPMENT CO., S. MARS, INC., Hertz & Company, Tubell & Company, Hilborn-Hamburger, Inc. and G. Hirsch Sons, Inc., Petitioners,

against

L. METCALFE WALLING, Administrator of Wage and Hour Division, United States Department of Labor, Respondent

STATEMENT UNDER RULE 13

This is a petition to review a Wage Order of the Administrator of the Wage and Hour Division of the United States Department of Labor. The proceeding was commenced on June 6, 1942 by Order No. 145, made on that date, pursuant to Sections 5 and 8 of the Fair Labor Standards Act of 1938, which order appointed Industry Committee No. 45 for the Embroideries Industry, and directed said Committee to recommend minimum wage rates for said industry in accordance with Section 8 of said Act. Said Committee, on June 30, 1942, after investigation, filed a report with the Administrator. Said Administrator directed that public hearings be held and the notice of hearing, dated September 6, 1942, was duly published.

Public hearings before Major Robert N. Campbell, presiding officer designated by Honorable L. Metcalfe Walling, Administrator of the Wage and Hour Division, were held [fol. 34] from November 2, 1942 to November 13, 1942, pursuant to said notice. The record of these hearings was transmitted to Honorable L. Metcalfe Walling, the Administrator of the Wage and Hour Division. Oral argument was heard on January 26, 1943, before the Administrator. The order of the Administrator establishing a 40 cents minimum wage rate in the embroideries industry, as recommended by the Industry Committee No. 45, and also restricting and prohibiting industrial homework in the industry, was dated August 21, 1943 and filed by the Administrator on September 1, 1943. The Findings and Opinion of the Administrator is dated August 21, 1943. The petition for review of Gemsco, Inc., et al. was filed on September 26, 1943.

There has been no change of parties herein.

Wage Order as Amended

Effective September 20, 1943

Part 633—Minimum Wage Rate in the Embroideries Industry

In the matter of the recommendation of Industry Committee No. 45 for a minimum wage rate in the Embroideries Industry.

Whereas on June 6, 1942, by Administrative Order No. 145, the Administrator, acting pursuant to sections 5 and 8 of the Fair Labor Standards Act of 1938, appointed Industry Committee No. 45 for the Embroideries Industry, and directed the Committee to recommend minimum wage rates for the Embroideries Industry in accordance with section 8 of the Act; and

Whereas the Committee included four disinterested persons representing the public, a like number of persons representing employers in the Embroideries Industry, and a [fol. 35] like number representing employees in the industry, and each group was appointed with due regard to the geographical regions in which the Embroideries Industry is carried on; and

Whereas Industry Committee No. 45, on June 30, 1942, after investigation of conditions in the Industry, filed with the Administrator a report containing its recommendations for a minimum wage rate of 40 cents an hour in the Embroideries Industry; and

Whereas after notice published in the Federal Register on September 16, 1942, Major Robert N. Campbell, the Presiding Officer designated by the Administrator, held a public hearing commencing on November 2, 1942 and continuing through November 13, 1942, at New York, New York, upon the Committee's recommendation and upon the question of what, if any, prohibition, restriction or regulation of home work is necessary to carry out the purposes of the wage order for the Embroideries Industry, to prevent the circumvention or evasion thereof and to safeguard the minimum wage rate established therein, in the event an order is issued approving the recommendations of the Committee, at which all interested persons were given an opportunity to be heard; and

Whereas the complete record of the proceeding before the Presiding Officer was transmitted to the Administrator; and

Whereas pursuant to notice published in the Federal Register on December 29, 1942, all persons who appeared at the hearing were given leave to file briefs on or before January 19, 1943; and

Whereas pursuant to notice published in the Federal Register on December 29, 1942, oral argument by persons who appeared at the hearing was heard by the Administrator on January 26, 1943; and

Whereas the Administrator, upon reviewing all the evidence adduced in this proceeding and giving consideration [fol. 36] to the provisions of the Act with special reference to sections 5 and 8, has concluded that the Industry Committee's recommendation for a minimum wage rate for the Embroideries Industry, as defined in Administrative Order No. 145, is made in accordance with law, is supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the Industry Committee, will carry out the purposes of section 8 of the Act, and that it is necessary to include terms and conditions in the wage order for this Industry with respect to industrial home work to carry out the purpose of such order, to prevent the circumvention of evasion thereof and to safeguard the minimum wage rate established therein; and

Whereas the Administrator has set forth his decision in an opinion entitled Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 45 for a Minimum Wage Rate in the Embroideries Industry and Industrial Home Work in the Embroideries Industry dated this day, a copy of which may be had upon request addressed to the Wage and Hour Division, United States Department of Labor, 165 West 46th Street, New York, New York;

Now, therefore, *It is ordered*, That:

§ 633.1 *Approval of recommendation of industry committee.* The Committee's recommendation is hereby approved, and, in accordance with such recommendation,

§ 633.2 *Wage rate.* Wages at a rate of not less than 40 cents an hour shall be paid under section 6 of the Fair

Labor Standards Act of 1938 by every employer to each of his employees in the Embroideries Industry who is en- [fol. 37] gaged in commerce or in the production of goods for commerce.

§ 633.3 *Restriction of home work.* No work in the Embroideries Industry, as defined herein, shall be done in or about a home, apartment, tenement, or room in a residential establishment after November 15, 1943,* except by such persons as have obtained special home work certificates issued pursuant to applicable regulations of the Wage and Hour Division, authorizing industrial home work by a worker who—

(1) (a) Is unable to adjust to factory work because of age or physical or mental disability; or

(b) Is unable to leave home because his presence is required to care for an invalid in the home; *and*

(2) (a) Was engaged in industrial home work in the Industry, as defined, prior to November 2, 1942 (except that if this requirement shall result in unusual hardship to the individual home worker it shall not be applied); or

(b) Is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or of a Sheltered Work Shop, as defined in § 525.1, Part 525, Chapter V, Title 29, Code of Federal Regulations.

§ 633.4 *Posting of notices.* Every employer employing any employees engaged in commerce or in the production of goods for commerce in the Embroideries Industry shall [fol. 38] post and keep posted in a conspicuous place in each department of his establishment where such employees are working such notices of this order as shall be prescribed from time to time by the Wage and Hour Division of the United States Department of Labor.

§ 633.5 *Definition of the Embroideries Industry.* The Embroideries Industry, to which this order shall apply, is hereby defined as follows:

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* The effective date was postponed to March 31, 1944 by order of the Administrator filed November 8, 1943. 8 Federal Register 15362.

The production of all kinds of hand and machine-made embroideries and ornamental stitchings, including, but not by way of limitation, tucking, shirring, smocking, hemstitching, hand rolling, fagoting, Bonnaz embroidery, appliqueing, crochet beading, hand drawing, machine drawing, rhinestone trimming, sequin trimming, spangle trimming, eyelets, passementerie, pleating, the application of rhinestones and nailheads, stamping and perforating of designs, Schiffli embroidery and laces, burnt-out laces and velvets, Swiss hand machine embroidery, thread splitting, embroidery thread cutting, scallop cutting, lace cutting, lace making-up, making-up of emboidered yard goods, straight cutting of embroidery and cutting out of embroidery, embroidery trimmings, bindings (not made in textile establishments), pipings and emblems: *Provided, however,* That (1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or other article, and (2) the manufacture of covered buttons and buckles, shall not be included.

§633.6 *Scope of the definition.* The definition of the Embroideries Industry covers all occupations in the industry which are necessary to the production of the articles specified in the definition, including clerical, maintenance, ship-
[fol. 39] ping and selling occupations: *Provided, however,* That where an employee covered by this definition is employed during the same workweek at two or more different minimum rates of pay, he shall be paid the highest of such rates for such workweek unless records concerning his employment are kept by his employer in accordance with applicable regulations of the Wage and Hour Division.

§ 633.7. *Effective date.* This wage order shall become effective September 20, 1943.

Signed at New York, New York, this 21st day of August, 1943. Section 633.1 to 633.7 inclusive, issued under the authority contained in Section 8, 52 Stat. 1060, 1064; 29 U. S. C., Sec. 208.

L. Metcalfe Walling, Administrator Wage and Hour Division United States Department of Labor.

Published in Federal Register September 2, 1943.

[fol. 40] WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, NEW YORK, NEW YORK

In the Matter of The Recommendation of Industry Committee No. 45 for a Minimum Wage Rate in the Embroideries Industry and Industrial Home Work in the Embroideries Industry

FINDINGS AND OPINION OF ADMINISTRATOR—August 21, 1943 [1]

This is a proceeding pursuant to Section 8 of the Fair Labor Standards Act of 1938 (herein called the Act), to determine whether the 40-cents-per-hour minimum wage recommendation of Industry Committee No. 45 for the Embroideries Industry (herein called the Committee) shall be approved and carried into effect.

By Administrative Order No. 145,[2] issued pursuant to Section 5(b) of the Act, on June 6, 1942 I appointed Industry Committee No. 45 for the Embroideries Industry "to investigate conditions in the industry and recommend to the Administrator minimum wage rates for all employees [fol. 41] thereof" who are subject to the Act.[3] Industry Committee No. 45 was convened on June 30, 1942, and on that date by the unanimous vote of its members, made the following recommendation:

> Wages at a rate of not less than 40 cents an hour shall be paid under Section 6 of the Fair Labor Standards Act of 1938 by every employer to each of his employees

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[1] For the benefit of the reader, footnotes in this Opinion make reference to certain relevant portions of the record. These findings, however, are based upon the entire record, not solely upon the portions cited or referred to. Reference to the transcript of the public hearing held before Major Robert N. Campbell, as Presiding Officer, on November 2 through November 7, and November 10 through November 13, 1942, inclusive, are cited throughout this Opinion by the letter "R."

[2] Administrator's Exhibit 1-A.

[3] Employees exempted by virtue of the provisions of Section 13(a) of the Act and employees coming under the provisions of Section 14 were excluded from the Committee's consideration by express language in paragraph 4 of Administrative Order No. 145 (Administrator's Exhibit 1-A).

in the Embroideries Industry (as defined in Administrative Order No. 145) who is engaged in commerce or in the production of goods for commerce.[4]

On June 30, 1942, pursuant to Section 511.19 of the regulations applicable to industry committees,[5] the Report and Recommendation of the Committee was transmitted to me.[6] The Committee's records were transmitted to me on July 13, 1942, in accordance with Section 511.20 of the aforesaid regulations.[7]

Pursuant to Section 8(d) of the Act and upon due notice published in the Federal Register on September 16, 1942,[8] a public hearing was held before Major Robert N. Campbell, as Presiding Officer, on November 2 through November 7, and November 10 through November 13, 1942, in New York, New York.

[fol. 42] Extensive testimony was given, and many exhibits were received in evidence. All interested persons were given an opportunity to submit evidence on the following questions:

1. Whether the recommendation of Industry Committee No. 45 should be approved or disapproved;

2. In the event an order is issued approving the recommendation, what, if any, prohibition, restriction, or regulation of home work in this industry is necessary to carry out the purpose of such order, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate established therein.

At this hearing evidence relating to conditions affecting the Committee's recommendation with respect to the Embroideries Industry and its various branches was submitted by a representative of the staff of the Wage and Hour Divi-

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[4] Administrator's Exhibit 1-D.

[5] Title 29, c. V, Part 511, Code of Federal Regulations (Administrator's Exhibit 1-E).

[6] Administrator's Exhibit 1-G.

[7] Administrator's Exhibit 1-H.

[8] Administrator's Exhibit 1-F; 7 F. R. 7295.

sion, United States Department of Labor.[9] Appearing in favor of the recommendation were representatives of labor unions and trade associations, as well as individual employers in the Industry.[10] Opposition to the recommendation was voiced on behalf of an employer in the art needle- [fol. 43] work branch of the Industry.[11] The public hearing in this proceeding consumed ten days, and the transcript of its proceedings contains 1691 pages. Evidence with respect to industrial home work was voluminous and occupies by far the greater part of the record.[12] Insofar as the question is before me, I find that all persons who desired to present evidence with reference to the questions under consideration were given a full and fair opportunity to be heard.

There were made a part of the record for the purpose of indicating the Committee's procedure, the journal of the Committee,[13] a transcript of the meeting and the exhibits and data submitted to the Committee,[14] and copies of ad-

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[9] Verl E. Roberts, Acting Chief of the Industry Committee Studies Section of the Economics Branch, Wage and Hour Division, United States Department of Labor, appeared on behalf of the Administrator.

[10] Appearances *in support of the Committee's recommendation* were made by the following employer associations and individual employers: David B. Cherashore, Counsel, Pleaters, Stitchers and Embroiderers Association, Inc., Philadelphia, Pennsylvania (R. 74); Norman Kaliski, Counsel, Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York (R. 75); Samuel S. Allan, Counsel for manufacturers of military and naval insignia devices for officers (R. 75). Also appearing *in support of the recommendation* was Nathan Weinberg, Associate Economist, International Ladies' Garment Workers' Union (R. 68).

[11] Joseph L. McCormack, Counsel, Fixler Bros., Chicago, Illinois, contended that a 40-cent minimum would be too high in the Chicago area for stenographers, errand boys, and shipping clerks at a time when the country was not at war (R. 77).

[12] See Part B, *infra*.

[13] Administrator's Exhibit 1-B.

[14] Administrator's Exhibit 1-C.

ministrative orders, notices, and other relevant items.[15]

Upon the conclusion of the hearing, the complete record of the proceedings was transmitted to me. All parties at the hearing were notified by notice published in the Federal Register on December 29, 1942, that briefs would be received up to January 19, 1943,[16] and that oral argument would be heard on January 26, 1943.[17]

[fol. 44] In the course of the hearing before the Presiding Officer, there were various motions, requests, and objections concerning the inclusion or exclusion of evidence by the several parties to the proceeding.[18] I have reviewed the

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[15] Administrator's Exhibits 1-A, 1-E, 1-F, 1-G, 1-H, 1-I.

[16] 7 F. R. 11029. This notice superseded a notice published on December 18, 1942 (7 F. R. 10586), setting the date for filing briefs as January 11, 1943, and the date of oral argument as January 15, 1943.

Briefs were filed supporting the Committee's minimum wage recommendation but opposing the restriction or prohibition of industrial home work in the Industry on behalf of the National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pipings and Trimmings, Inc., New York, New York; Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York; Pleaters, Stitchers and Embroidery Manufacturers Association, Chicago, Illinois; and manufacturers of military and naval insignia devices.

[17] Oral argument was restricted, in accordance with the request of the parties, to the home work question. Oral argument was offered by Norman Kaliski, Counsel, on behalf of the Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York; Solomon S. Friedman, Counsel, on behalf of the National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pipings and Trimmings, Inc., New York, New York; Samuel S. Allan, Counsel on behalf of manufacturers of military and naval insignia devices, New York, New York; and Elias Lieberman, Counsel, on behalf of the International Ladies' Garment Workers' Union, New York, New York.

[18] Samuel S. Allan, Counsel for the manufacturers of military and naval insignia devices, moved to dismiss the hearing with respect to his clients on the ground that the work

actions and rulings of the Presiding Officer on these various matters and find no prejudicial error therein. Insofar as may be necessary to the findings and conclusions herein, and except for those which are inconsistent with the findings, conclusions, and order set forth below, I hereby affirm them.

I have reviewed, considered, and appraised the entire record, read the briefs submitted, and consulted with subordinates who have reviewed and analyzed the record and the briefs. Upon all the evidence, I make the following findings, conclusion, and order:

[fol. 45] A

Minimum Wage Recommendation of Industry Committee No. 45

I. Definition of the Embroideries Industry

Administrative Order No. 145, dated June 6, 1942, which appointed the Committee, defined the Industry as follows:

> The production of all kinds of hand and machine-made embroideries and ornamental stitchings, including, but not by way of limitation, tucking, shirring, smocking, hemstitching, hand rolling, fagoting, Bonnaz embroidery, appliqueing, crochet beading, hand drawing, machine drawing, rhinestone trimming, sequin trimming, spangle trimming, eyelets, passementerie, pleating, the application of rhinestones and nailheads, stamping and perforating of designs, Schiffli embroidery and laces, burnt-out laces and velvets, Swiss hand-machine embroidery, thread splitting, embroidery thread cutting, scallop cutting, lace cutting, lace making-up, making-up of embroidered yard goods, straight cutting of embroidery and cutting out of embroidery,

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performed by such manufacturers does not fall within the Embroideries Industry as defined. This motion is hereinafter considered in the section entitled *Definition of the Embroideries Industry, infra*, pp. ——. Various rulings of the Presiding Officer which dealt with motions, requests, and objections to the admissibility of evidence on the question of prohibition, restriction, or regulation of home work in the Industry are discussed in Part B of this Opinion, *infra*, pp. 36-46.

> embroidery trimmings, bindings, not made in textile establishments), pipings and emblems; *provided, however*, that (1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or other article, and (2) the manufacture of covered buttons and buckles, shall not be included.[19]

The order further provided:

> The definition of the embroideries industry covers all occupations in the industry which are necessary to the [fol. 46] production of the articles specified in the definition, including clerical, maintenance, shipping and selling occupations, *provided, however*, that where an employee covered by this definition is employed during the same workweek at two or more different minimum rates of pay, he shall be paid the highest of such rates for such workweek unless records concerning his employment are kept by his employer in accordance with applicable regulations of the Wage and Hour Division.[20]

This definition does not differ substantially from the definition contained in the wage order which, effective January 27, 1941, established a 37½-cent minimum hourly wage rate for the Embroideries Industry.[21] The scope of the Industry as thus defined and the reasons for the inclusion and exclusion of various processes and articles are set forth in detail in the Findings and Opinion of former Administrator Philip B. Fleming.[22]

The language of the earlier definition has been modified in the new definition to cover specifically the "stamping and perforating of designs." This change has the effect merely of clarifying the inclusion of stamped art goods

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[19] Administrator's Exhibit 1-A, paragraph 2.

[20] *Id.*, paragraph 3.

[21] Title 29, c. V, Part 589, Code of Federal Regulations; Administrator's Exhibit 2, p. 1.

[22] *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15 for Minimum Wage Rates in the Embroideries Industry* (December 28, 1940), pp. 17-22.

within this Industry. In view of the fact that most embroidery follows a design which has been stamped on the fabric, article, or garment, and since such stamping is a major process in the production of stamped art goods,[23] the Embroideries Industry definition contained in the wage [fol. 47] order of January 27, 1941, has been interpreted as including the stamping and perforating of designs.

The parenthetical clause "not made in textile mills" has the effect of excluding the manufacture of bindings produced in textile establishments.[24]

Samuel S. Allan, Counsel for manufacturers of military and naval insignia devices, moved at the conclusion of the hearing to dismiss the hearing with respect to this group of manufacturers for the following two reasons, among others:

> 1. * * * that the definition of embroideries as issued by the Administrator and promulgated by him excludes the military embroiderers from the definition and no evidence whatsoever has been offered by the Government or by the proponents to include such embroiderers in this proceeding.
>
> 2. * * * that it had been established by the evidence offered on behalf of those embroiderers that they are of a class separate and apart from the embroiderers and crochet beaders coming within the definitions.[25]

The validity of the first of these objections depends upon the construction to be given to that portion of the definition which provides that "(1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or other article * * * shall not be included." The scope and purpose of this clause is discussed at some length in the Findings and Opinion of the Administrator that accompanied the wage

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[23] See Administrator's Exhibit 2, p. 1; Administrator's Exhibit 4, p. 2.

[24] Administrator's Exhibit 4, p. 2. Woven bindings produced in textile mills on textile machinery are included in the Textile Industry. Title 25, c. V, Parts 552, 599, and 619, Code of Federal Regulations.

[25] R. 1687.

order establishing a 37½-cent hourly wage for the Embroideries Industry.[26]

[fol. 48] "Emblems" are, in fact, specifically mentioned in the definition as included in the Embroideries Industry. They include embroidered insignia, motifs, or monograms for decoration on military, service, fraternal, and other apparel, caps and hats, or other articles and may be either hand-made or machine-made.[27] It is clear, therefore, that unless military and naval insignia are produced by the manufacturers of the uniforms on which they are to be worn, they are covered by the Embroideries Industry definition.

The evidence in the record does not, in my opinion, sustain the contention that the embroidering of military and naval insignia is excluded from the Industry. On the contrary, although they are produced as distinct and separate items, they derive their sole utility and significance from being attached to and worn upon a uniform. Some non-military embroideries, such as Schiffli and passementerie, are also produced as separate items to be sewn on dresses and other garments.

The embroidery work performed by the concerns on whose behalf the objections to their inclusion in the Embroideries Industry were made is hand work involving the use of gold bullion thread and is classified in the Industry as hand embroidery.[28] While a few concerns specialize at the present time in the hand embroidering of military and naval insignia, this type of work is also performed by concerns which are primarily engaged in other hand embroidery, crochet beading, and other embroidery operations on garments and other articles for civilian use.[29] The degree of skill required by bullion embroidery of military [fol. 49] and naval insignia appears to be somewhat greater than that required in some other types of embroidery

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[26] *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, pp. 17-18.

[27] Administrator's Exhibit 2, pp. 5, 6.

[28] *Id., at* 2-9; Sprung, R. 1468.

[29] Sprung, R. 1457-1464, 1468; Orloff, R. 1126, 1127; Friedensohn, R. 1060-1063.

work,[30] but the evidence clearly indicates that it does not require any special or distinctive skill which workers skilled in hand embroidery or crochet beading cannot, with some practice or training, acquire with relative ease.[31] Bullion embroidery is not, of course, limited to military and naval insignia.[32] Some types of insignia require machine embroidery as well as bullion embroidery.[33]

With respect to the second of Mr. Allan's objections, it is likewise clear from the evidence that while the Embroideries Industry produces primarily for manufacturers of apparel and apparel accessories, it also serves producers of shoes, handbags, art linens, upholstery, and similar articles.[34] The criterion of coverage by the definition is the operations performed, not the nature of the articles worked upon. Any concern, other than the manufacturer of the article, fabric, or garment worked upon, which engages in embroidery operations is covered by the definition.[35]

I find, therefore, upon the facts in evidence, that the operations performed by the so-called manufacturers of military and naval insignia are properly regarded as included in the Embroideries Industry. On the basis of all the evidence in the record, I find, taking into consideration [fol. 50] the nature of the Industry, economic and competitive conditions within the Industry, and the competitive relationships between the Industry as defined and other industries, that the definition of the Embroideries Industry as contained in Administrative Order No. 145 is appropriate and in accordance with economic and competitive conditions.

II. Membership of Industry Committee No. 45

Industry Committee No. 45 for the Embroideries Industry, appointed by Administrative Order No. 145, consisted

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[30] Orloff, R. 1124-1126; Friedensohn, R. 1061-1062; see also oral argument, Elias Lieberman, p. 72.

[31] Friedensohn, R. 1061, 1088; Orloff, R. 1126; Franks, R. 806; Pelino, R. 893.

[32] Friedensohn, R. 1088-1090.

[33] Sprung, R. 1468-1474; see also oral argument, Elias Lieberman, pp. 70-72.

[34] Administrator's Exhibit 4, p. 1.

[35] Administrator's Exhibit 2, pp. 2-6; Administrator's Exhibit 4, pp. 2, 3.

of the following representatives of the public and of employers and of employees in the Industry: [36]

For the Public:

Max Meyer, Chairman, Sterling National Bank, 1410 Broadway, New York, New York

Clyde E. Dankert, Professor, Economics Department, Dartmouth College, Hanover, New Hampshire

Elizabeth S. Magee, Executive Secretary, The Consumers' League of Ohio, 341 Engineers' Building, Cleveland, Ohio

Kenneth L. M. Pray, Professor of Social Planning and Administration, Pennsylvania School of Social Work, 311 South Juniper Street, Philadelphia, Pennsylvania.

For the Employees:

Irving Epstine, Business Agent of Local 252, New York Joint Board, Textile Workers' Union of America, 153 West 33rd Street, New York, New York

Z. L. Freedman, President, Bonnaz, Singer, Hand-Embroiderers, Tuckers, Stitchers and Pleaters' [fol. 51] Union, Local No. 66, International Ladies' Garment Workers' Union, 135 West 33rd Street, New York, New York

Abraham Plotkin, Manager, Embroidery Workers' Union, Local 212, International Ladies' Garment Workers' Union, 329 West Monroe Street, Chicago, Illinois

Frederick F. Umhey, Executive Secretary, International Ladies' Garment Workers' Union, 3 West 16th Street, New York, New York

For the Employers:

Abraham Friedensohn, Public Art Embroidery, 29 West 38th Street, New York, New York

Ernest Mosmann, John Mosmann & Sons, Inc., 1217 67th Street, North Bergen, New Jersey

Irvin H. Weiss, Executive Director, Pleaters, Stitchers, and Embroidery Manufacturers' Association of Chicago, 166 West Jackson Boulevard, Chicago, Illinois

Louis Knee, Star Binding and Trimming Corporation, 12 East 22nd Street, New York, New York

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[36] Administrator's Exhibit 1-A.

Section 5(b) of the Act provides that the Industry Committee "shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on."[37] In view of the evidence concerning the geographical distribution of the In- [fol. 52] dustry,[38] it is my view that these requirements of the Act were fulfilled in the appointment of this Committee.[39]

III. Recommendation Made in Accordance with Law

Industry Committee No. 45 determined "that labor costs will not be affected by the establishment of the recommended minimum wage rate to an extent which will substantially curtail employment or cause material dislocation in the industry as now carried on."[40] The Committee also determined "that nothing justified any classification within the industry for the purpose of recommending the highest minimum wage rate possible under the Act which will not result in substantial curtailment of employment in any branch of the industry" and that its recommendation "will not give a competitive advantage to any group in the industry."[41]

The Committee had before it a study prepared by the Economics Branch, Wage and Hour Division, United States Department of Labor, entitled *Some Recent Economic and Legislative Developments Bearing on the Establishment of a Minimum Wage Rate in the Embroideries Industry*, June

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[37] Section 5(b) of the Fair Labor Standards Act, c. 676, 52 Stat. 1060; 29 U. S. C., Supp. IV, Sec. 201 *et seq.*

[38] Administrator's Exhibit 2, pp. 30-37; Administrator's Exhibit 4, pp. 11-15.

[39] Cf. *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, p. 3.

[40] Administrator's Exhibit 1-D, p. 2.

[41] Administrator's Exhibit 1-D, p. 2.

1942.[42] Two reports which were considered by Industry Committee No. 15[43] in making its recommendation for the [fol. 53] 37½-cent minimum hourly wage rate in the Embroideries Industry were also made available to the Committee. These reports were prepared by the Research and Statistics Branch, Wage and Hour Division, and the Bureau of Labor Statistics, United States Department of Labor, and were entitled, respectively, *Report on the Embroideries Industry*, August 1940,[44] and *Earnings and Hours in the Embroidery and Related Products Industry*, March 1940.[45] The Committee also considered data on living costs in different cities and regions and changes in living costs which were made available in the form of two releases prepared by the Bureau of Labor Statistics, United States Department of Labor, entitled *Estimated Intercity Differences in Cost of Living, December 15, 1941*[46] and *Living Costs in Large Cities, March 15, 1942.*[47] The Committee at an informal hearing received additional data offered to it by representatives of employer associations and labor organizations in the Industry.[48]

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[42] Administrator's Exhibit 4.

[43] With the exception of Mr. Irving Epstine, a representative of the employees in the Industry, and Mr. Irvin H. Weiss, a representative of the employers in the Industry, all of the members of Industry Committee No. 45 also served on Industry Committee No. 15.

[44] Administrator's Exhibit 2.

[45] Administrator's Exhibit 3.

[46] Administrator's Exhibit 5.

[47] Administrator's Exhibit 7.

[48] Mr. I. H. Friedman, Executive Secretary, Bias Fabric Manufacturers' Association, New York, New York; Mr. J. Bernard Saltzman, Counsel, Hand Machine Embroiderers Association, Passaic, New Jersey; and Dr. Lazare Teper, Director of Research, International Ladies' Garment Workers' Union, New York, New York. Dr. Teper submitted for the Committee's consideration a memorandum entitled *Forty-Cent Minimum Wage for the Women's Apparel Industry* (International Ladies' Garment Workers' Union Exhibit 1) and two tables entitled, respectively, *Increases in employment, Embroidery Industry, among members of*

Upon the evidence in the record, I find that the Committee considered conditions in the Embroideries Industry, [fol. 54] including the factors required by Section 8 to be considered by it, and that the Committee's recommendation was made in accordance with law.

IV. Effect of the Recommended Minimum Hourly Wage of 40 Cents upon Employment in the Industry

Section 8(a) of the Act states the objective of Congress of "reaching, as rapidly as is economically feasible without substantially curtailing employment * * * a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce." I am required by this Section to consider whether the recommended minimum wage rate will, having due regard to economic and competitive conditions, substantially curtail employment in the Industry. [49]

I am required to approve and carry into effect the recommendation of the Committee for a 40-cent minimum hourly wage rate in the Embroideries Industry if I find that it was made in accordance with law, is supported by the evidence adduced at the hearing, and, taking into consideration the same factors as were required to be considered by the Industry Committee, will carry out the purposes of Section 8 of the Act. [50] I have already found that the Committee's recommendation was made in accordance with law. The evidence bearing on the Committee's recommendation which was made a part of the record at the hearing before the Presiding Officer included the documentary material fur- [fol. 55] nished to the Committee and additional material bearing on the Committee's recommendation. [51]

Local 66, I. L. G. W. U., between 1940 and 1941 and *Embroidery Sales (receipts for contract work) to Dress Manufacturers under contract with the International Ladies' Garment Workers' Union in the New York Metropolitan Area* (Administrator's Exhibit 1-C).

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[49] Section 8(a) of the Act.

[50] Section 8(d) of the Act.

[51] Administrator's Exhibits 2, 3, 4, 5, and 7. Two additional releases issued by the Bureau of Labor Statistics, United States Department of Labor, entitled, respectively,

A. *Aggregate Employment in the Industry*

1. Effect of the Proposed Minimum on Wage and Operating Costs in Embroidery Establishments

The present minimum hourly wage rate in the Embroideries Industry is 37½ cents, pursuant to a wage order issued by former Administrator Philip B. Fleming upon the recommendation of Industry Committee No. 15.[52] In issuing said wage order, the Administrator found that the recommended minimum wage would not result in substantial curtailment of employment in the Embroideries Industry as a whole nor in any of the branches of the Industry.[53] He found that almost 90 percent of the embroidery establishments are located in the New York City (including northern New Jersey), Chicago, and Philadelphia metropolitan areas, that fixing a minimum wage of 37½ cents an hour would increase labor costs in the three main areas 2.06 percent and in the remaining areas 4.03 percent; that the ratio of labor costs to operating costs was 40 percent in August 1940 for the Embroideries Industry as a whole, 45 percent for pleating, stitching, Bonnaz and hand-embroidery, 65 percent for Swiss hand loom machine products, 40 percent for Schiffli machine products, and 30 percent for bindings, pipings and trimmings; and that the fixing of the recommended minimum would result in an [fol. 56] increase in operating costs of 0.82 percent for the Industry as a whole in the three main areas and 1.61 percent in the remaining areas.[54]

A survey by the Bureau of Labor Statistics, United

Estimated Intercity Differences in Cost of Living June 15, 1942, and *Change in Cost of Living in Large Cities, July 15, 1942*, were included in the record (Administrator's Exhibits 6 and 8).

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[52] Title 29, c. V, Part 589, Code of Federal Regulations.

[53] *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, p. 6.

[54] *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, pp. 4-13; Administrator's Exhibit 2, pp. 86-90.

States Department of Labor,[55] containing basic information on average hourly earnings in the Industry in March 1940 was made a part of the record in the proceeding leading to the establishment of the 37½-cent minimum. This survey may also be used as a basis for estimating the probable direct increase in labor costs and operating costs which may be expected to result from the adoption of a 40-cent minimum at the present time.[56] When the rates obtained by the Bureau of Labor Statistics are adjusted to bring all rates up to at least the present 37½-cent minimum, average hourly earnings are estimated as 61.0 cents in the three main areas, an increase of 1.1 cents over the average for 1940, and 47.4 cents for the other areas, representing an increase of about 1.8 cents. Less than one-third of the employees in the three main areas and about one-half of the wage earners in the other areas would appear, upon this basis, to earn less than 40 cents per hour.[57]

[fol. 57] Upon the assumption that the only increase in wage rates since January 27, 1941 when the wage order establishing a minimum hourly rate of 37½ cents became effective is the increase required to bring workers receiving less than 37½ cents an hour up to the wage order rate, the estimated direct increase in the wage bill resulting from the establishment of a minimum wage rate of 40 cents an hour would be 1.2 percent in the three main areas and 2.6 percent in the other areas.[58] The study of the Economics

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[55] Administrator's Exhibit 3; see also Administrator's Exhibit 4.

[56] Administrator's Exhibit 4, p. 57, Appendix A. For the purpose of this proceeding, the average hourly earnings for the Industry shown in the Bureau's wage survey and report of March 1940 are regarded as having been augmented by the amount necessary to increase all those earning less than 37½ cents an hour to 37½ cents (excluding home workers). It is generally recognized that wage rates in the Embroideries Industry as a whole have increased since 1940. The estimates of the extent to which wage bills may be increased by the establishment of a 40-cent minimum hourly wage rate set forth in Administrator's Exhibit 4 tend, therefore, to overstate the actual effects of such a rate.

[57] Administrator's Exhibit 4, p. 43; table 18, p. 44.

[58] *Id.* at 43; table 19, p. 45; R. 70.

Branch tends to show that increase in labor costs since August 1949 have been accompanied by equal, if not greater, increases in non-labor costs, such as costs of raw materials; upon this basis the estimated increase in operating costs resulting from a 40-cent hourly minimum would be not more than one-half of one percent in the three main areas, while the increase for other areas would be approximately 1.2 percent.[59]

These estimates do not take into account, as has been noted, any general upward movement in wages which has occurred since the present wage order became effective. Wages in the Embroideries Industry, as in other industries, are higher now than they were in 1940.[60] This indicates clearly that the effects of the 40-cent minimum on labor costs and total operating costs will be even smaller than those indicated above. Nor can the increased minimum be expected to affect materially wages now above the minimum. Such wages generally are influenced more significantly by other factors, including the general business situation, the bargaining position of labor, and the attitude of management. Furthermore, it is apparent that since there is no legal compulsion to raise these wages, increases will not be given if they tend to curtail operations. At the [fol. 58] present time, of course, such wages generally are subject to the provisions of the Emergency Stabilization Act [61] and Executive Orders Nos. 9250 [62] and 9328.[63]

I conclude that, even assuming that the Industry were unable to absorb the wage increase through operating economies or to pass the increase along, the insignificant rise in operating costs which will result from the recommended minimum will not cause substantial curtailment of employment in the Industry.

Looking now to the different types of embrodiery work performed by the Embroideries Industry and utilizing the data and assumptions already referred to, it appears that

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[59] *Id.* at 52; table 26, p. 54.

[60] Administrator's Exhibit 4, p. 52; table 26, p. 54.

[61] Emergency Stabilization Act of October 2, 1942, c. 26, 56 Stat. 23; 50 U. S. C., sec. 901.

[62] 7 F. R. 7871.

[63] 8 F. R. 4681.

in Bonnaz embroidery, pleating, stitching and hand embroidery the increase in the wage bill resulting from a 40-cent hourly minimum would be 0.8 percent for the three main areas, and 1.7 percent for all other areas.[64] The increase in operating costs would be less than one-half of one percent in the main areas and less than one percent in the other areas.[65] In Swiss hand-machine products the percentage increase in labor costs resulting from the recommended minimum would be 3.3 percent [66] while the increase in operating costs would be 2.1 percent.[67]

In Schiffli machine products the estimated wage bill increase would be 1.9 percent for the three main areas and [fol. 59] 3.2 percent in the other areas.[68] Operating costs would be increased 0.9 percent in the three main areas and 1.4 percent in the other areas.[69] In the production of bindings, pipings and trimmings the increase in the wage bill would amount to 1.9 percent for the main areas and 3.5 percent in the other areas,[70] the increase in operating costs to 0.8 percent and 1.4 percent, respectively.[71]

The establishment of the present minimum of 37½ cents an hour has not curtailed employment, although greater increases in costs were required by such minima.[72] The evidence in the record with respect to the establishment of a 40-cent minimum in this Industry indicates clearly that it

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[64] Administrator's Exhibit 4, p. 43; table 20, p. 46. There is, of course, considerable overlapping with respect to the different types of embroidery performed by plants in the Industry.

[65] Administrator's Exhibit 4, p. 55.

[66] Administrator's Exhibit 4, p. 43; table 21, p. 47.

[67] *Id.* at 55.

[68] Administrator's Exhibit 4, p. 43. Data covering the Swiss hand-machine and Schiffli branches to reflect completely a picture of the wage structure because members of the shop-owner's family are the only or primary workers in many of these establishments.

[69] Administrator's Exhibit 4, table 26, p. 54.

[70] *Id.* at 43; table 22, p. 48.

[71] *Id.*, table 26, p. 54.

[72] Administrator's Exhibit 2, p. 71; table 30, p. 72.

will not result in any substantial unemployment in the Industry or in any reasonabe subdivision thereof.

I conclude, therefore, that approval of the 40-cent minimum hourly wage rate which has been recommended by the Committee will not substantially curtail aggregate employment in embroidery establishments, nor result in substantial curtailment of employment in any group of plants in the Industry.

B. *Economic and Competitive Factors*

The administrator, in his Findings and Opinion on the recommendation of Industry Committee No. 15, considered in detail the various economic and competitive factors in the Industry which are significant in minimum wage pro- [fol. 60] ceedings under the Act. He found that they did not indicate, in the light of the anticipated increased wage cost resulting from the 37½-cents-an-hour minimum, that any substantial curtailment of employment would follow from the establishment of such a minimum.[73] In a great many of its aspects the evidence adduced at the hearing of this proceeding was merely repetitious of that upon which the Administrator based his previous findings. Accordingly, only evidence with respect to changes in economic and competitive factors that have developed since December 1940 needs to be touched upon in this opinion.

In the last two years the production of embroideries has experienced a marked upward swing.[74] Restrictions arising out of orders of the War Production Board such as limitations of pleating, prohibition of the use of nailheads, restricted use of gift braids and dyes and priority regulations applicable to rayon and rayon threads[75] have effected

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[73] *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, pp. 8-11.

[74] Administrator's Exhibit 4, p. 17; R. 72, 1195, 1236, 1237, 1262.

[75] Administrator's Exhibit 4, pp. 17, 18. The Industry generally has been able to adopt its operations to War Production Board restrictions, although plants which formerly specialized in pleating, tucking, and application of nailheads have been compelled to shift to other types of

some of the items used in the creation of embroidery embellishments. On the other hand, it appears that this Industry has likewise benefited by restrictions on the use of other materials for decorative accessories in that embroidery operations are now being substituted therefor.[76]

While in the past imports from abroad, particularly from the Philippines, China, France, and Japan, competed with [fol. 61] domestic products of the Embroideries Industry, the outbreak of the war has practically eliminated foreign sources of competition.[77]

Since the earlier proceeding leading to the establishment of a minimum wage rate of 37½ cents an hour, prices of raw materials and supplies used in the Industry have been sharply increased.[78] Embroidery establishments, however, have also been obtaining far better prices for their work than formerly. The enactment of the Emergency Price Control Act of 1942[79] and price regulations issued thereunder are intended to stabilize prices of both raw materials and finished goods and services and thus halt any inflationary trends, while preserving a balance between costs and prices.

I find that, having due regard to economic and competitive conditions, the proposed 40-cent minimum hourly wage rate will not substantially curtail employment in the Embroideries Industry or in any definable group of plants in the Industry.

C. Dislocation of Employment in the Industry

The possibilities of dislocation of employment resulting from the effect of the approval of the 37½-cent minimum

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embroidery work, such as crochet beading, hand embroidery, and bullion embroidery. With simplification of styles and designs for women's apparel has come a marked increase in the utilization of these types of embroidery for embellishment purposes.

[76] Administrator's Exhibit 4, p. 17.

[77] Administrator's Exhibit 2, p. 54; Administrator's Exhibit 4, pp. 21-26.

[78] Administrator's Exhibit 4, pp. 18, 19.

[79] Act of January 30, 1942, as amended October 2, 1942, c. 576, 56 Stat. 767; 50 U. S. C., sec. 901.

were considered by former Administrator Fleming in his Finding and Opinion on the recommendation of Industry Committee No. 15.[80] The Administrator found that in this Industry location of plants is not a major factor in estab- [fol. 62] lishing wage differentials. The evidence in this proceeding does not indicate that any different conclusion should be reached.[81] The 40-cent minimum will, as a matter of fact, tend to stabilize wages in the Industry and its various branches. Upon the basis of the evidence in the record, I find that the proposed minimum will not cause substantial dislocation of employment in any producing area or in any definable group of plants in the Industry.

V. Necessity for Classification Within the Industry

The need for, and the propriety of, classifications in the Embroideries Industry were considered by former Administrator Fleming in his Findings and Opinion on the recommendation of Industry Committee No. 15. He found that there was no basis for any classification within the meaning of Section 8(c) of the Act.[82] Industry Committee No. 45 determined, after due consideration, that nothing justified any classification within the Industry for the purpose of recommending the highest minimum wage rate which would not result in substantial curtailment of employment in any branch of the Industry and would not give a competitive advantage to any group in the Industry.[83] Since I have found that a 40-cent minimum will not cause any substantial curtailment or dislocation of employment in any definable

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[80] *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, pp. 12-13.

[81] Administrator's Exhibit 4, pp. 49, 52. On the basis of a 40-cent minimum for the entire Industry it was estimated the percentage increase in the wage bill for the New York area would be 1.1 percent; for Philadelphia, 1.6 percent; for Chicago, 2.1 percent; and for the other areas, 2.6 percent. *Id.*, table 19, p. 45.

[82] *Findings and Opinion of the Administrator in the Matter of the Recommendation of Industry Committee No. 15*, pp. 14-16.

[83] Administrator's Exhibit 1-D, p. 2.

group of plants in the Industry, and since this minimum [fol. 63] is the highest that may be fixed under the Act, it would appear to be unnecessary to consider in this proceeding whether any classifications should be made within the Industry. I have, nevertheless, considered the evidence on this matter. I find that the evidence in the record on competitive conditions as affected by transportation, living and production costs, wages established for work of like or comparable character by collective bargaining agreements between employers and employees through representatives of their own choosing, and wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the Industry does not indicate any basis for making classifications within the Industry within the meaning of Section 8(c) of the Act.[84]

VI. Conclusion

Upon reviewing the evidence in this proceeding and considering the provisions of the Act and the same factors which were required to be considered by the Committee, I conclude that the Committee's recommendation for the Embroideries Industry, as defined in Administrative Order No. 145, is made in accordance with law, is supported by the evidence adduced at the hearing, and will carry out the purposes of Section 8 of the Act. Accordingly, I approve the recommendation.

It is also my view that approval of the 40-cent minimum wage recommendation for this Industry will aid in working toward a stabilization of prices and costs of production and fair and equitable wages.

[fol. 64] B

Industrial Home Work in the Embroideries Industry

Section 8(f) of the Act provides that

> Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention

[84] Administrator's Exhibit 2, p. 105; Administrator's Exhibit 4, pp. 36, 37; Administrator's Exhibits 5-8.

or evasion thereof, and to safeguard the minimum wage rates established therein.

Representations having been made to me concerning the effects of industrial home work on the minimum wage structure of the Embroideries Industry and administrative experience having indicated the existence of a serious problem, I provided in the notice of hearing on the minimum wage recommendation of Industry Committee No. 45 that evidence should be taken on the following question:

> In the event an order is issued approving the recommendation, what, if any, prohibition, restriction or regulation of home work in this industry is necessary to carry out the purpose of such order, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate established therein.[85]

The hearing in this matter was convened by the Presiding Officer at 10:00 a. m., Monday, November 2, 1942, at the Astor Hotel, New York, New York. Morning and afternoon sessions were held through Saturday, November 7, 1942. The hearing reconvened on Tuesday, November 10, 1942, and morning and afternoon sessions were held through [fol. 65] November 13, 1942. Evening sessions were likewise held on Thursday, November 5, 1942, and Thursday, November 12, 1942. The transcript of the testimony given by witnesses who included officials of Federal and State agencies, representatives of employers' associations and labor organizations and individual employers and home workers occupies 1691 pages. A large amount of documentary material was made a part of the record,[86] includ-

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[85] Administrator's Exhibit 1-F.

[86] Administrator's Exhibits 9-19; Division of Labor Standards Exhibits 1-25; New York Department of Labor Exhibits 5-12; International Ladies' Garment Workers' Union Exhibits 1-12; Samuel S. Allan Exhibits 2 and 3; National Hand Embroiderers Association Exhibits 1 and 2; Pleaters, Stitchers and Embroiderers Association, Inc. Exhibits 1-21. Samples of hand embroidered insignia for Army and Navy officers' uniforms, and an exhibit showing steps followed in the production of epaulets for Navy officers' uniforms by the Vanguard Military Equipment Corporation, New York, New York, were included in the record as Samuel S. Allan Exhibits 1 and 4.

ing a report prepared for this proceeding by the Economics Branch, Wage and Hour Division, United States Department of Labor, entitled *The Current Status of Home Work in the Embroideries Industry, October 1942.*[87]

Basic information concerning industrial home work in the Embroideries Industry and inspection problems arising out of the home work system was supplied by Harry Weiss, Director of the Economics Branch, Wage and Hour Division, United States Department of Labor, and by four of the Division's inspectors having experience in home work inspections in the Industry.[88] Additional material was [fol. 66] furnished by the Bureau of Labor Statistics and the Children's Bureau, United States Department of Labor.[89]

Prohibition of industrial home work in the Industry was urged by representatives of Federal and State agencies,[90]

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[87] Administrator's Exhibit 9. The report contains data on the number of industrial home workers in the Industry, the principal home work areas, the relationship of home work to factory work, home work operations, enforcement experience in administering the Act's provisions with respect to home workers, and other material factors.

[88] Harry Weiss, Director, Economics Branch, Wage and Hour Division, United States Department of Labor (R. 18-37, 488-677); Mrs. Vivian Dahl, Supervising Inspector, Philadelphia Regional Office, Region III (R. 350-369, 441-486); Roland G. Cheesman, Supervising Inspector, Newark Branch Office, Region II (R. 125-145, 678-695); Miss Branson Price, Inspector, New York Regional Office, Region II (R. 697-770); and Miss Anne Lande, Acting Supervising Inspector, New York Regional Office, Region II (R. 1661-1671).

[89] A. F. Hinrichs, Acting Commissioner, Bureau of Labor Statistics, United States Department of Labor, furnished information with respect to employment conditions in the needle trades in the New York metropolitan area (R. 42-67); Miss Beatrice McConnell, Director, Industrial Division, Children's Bureau, United States Department of Labor, supplied material on child labor in home work in the Industry and enforcement of minimum wage standards therein (R. 264-334).

[90] Mrs. Clara M. Beyer, Assistant Director, Division of Labor Standards, United States Department of Labor,

the International Ladies' Garment Workers' Union [91] and the Pleaters, Stitchers and Embroiderers Association, Inc. and Covered Button, Buckle and Belt Association of Philadelphia, Pennsylvania.[92]

Appearing in opposition to the prohibition of home work were the Pleaters, Stitchers and Embroiderers Association, [fol. 67] Inc., New York, New York;[93] National Hand Em-

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Washington, D. C. (R. 147-260); Mrs. Margaret F. Ackroyd, Chief, Division of Women and Children, Rhode Island Department of Labor, Providence, Rhode Island (R. 87-124); and Miss Kate Papert, Director, Division of Women in Industry and Minimum Wage, New York Department of Labor, New York, New York (R. 1476-1550).

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[91] The International Ladies' Garment Workers' Union was represented by its Counsel, Elias Lieberman. See the testimony of Nathan Weinberg, Associate Economist (R. 1578-1659).

[92] These associations were represented by David B. Cherashore, Counsel, and Joseph Nachmann, President, Pleaters, Stitchers and Embroiderers Association, Inc., of Philadelphia, Pennsylvania (R. 368-441).

[93] Witnesses for the Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York, which was represented at the hearing by Norman Kaliski, Counsel, and Walter Brower, Associate Counsel, included eight representatives of concerns in the Industry that employ home workers in New York City and twelve home workers employed by members of the Association (R. 771-904, 941-1337, 1551-1578).

By stipulation entered into between counsel for the Pleaters, Stitchers and Embroiderers Association, Inc., and the International Ladies' Garment Workers' Union, with the approval of counsel for the Division, it was agreed (R. 1394-1395):

> "First, the Pleaters, Stitchers, and Embroiderers Association were prepared to call—and they were ready to testify—at least one homeworker from each of the 70-some-odd members of the Association. There has been testimony as to the members of the Association which employ homeworkers.

broiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pipings and Trimmings, New York, New York;[94] Veil Dotters' Association

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"Secondly it is stipulated between us that if those homeworkers appeared, their testimony on direct would have been substantially the same as the testimony of those homeworkers who have already appeared and that on cross-examination the information elicited from them in answer to questions would likewise be substantially the same as that already elicited from other homeworkers."

It was also stipulated that eight additional representatives of embroidery concerns in New York City would have testified on direct and cross-examination to substantially the same effect as the other home work employers who testified at this hearing (R. 1265-1267).

Counsel for the Association explained that the stipulations were voluntarily entered into by him to conserve time and to reduce the length of the record by eliminating merely cumulative evidence. I find that the Presiding Officer's acceptance of the stipulations was appropriate.

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[94] The National Hand Embroiderers and Novelty Manufacturers Association and the Associated Manufacturers of Tubular Pipings and Trimmings were represented at the hearing by Counsel, Solomon S. Friedman, New York, New York. Testimony of three home workers employed by members of the former association was made a part of the record (R. 1396-1417). Counsel for the two associations and for the International Ladies' Garment Workers' Union agreed that the stipulation covering additional home workers entered into between the union and the Pleaters, Stitchers and Embroiderers Association, Inc. (footnote 93, *supra*) would also cover two additional home workers engaged in similar types of home work whom counsel had scheduled to be heard (R. 1435-1437). Mr. Friedman presented a summary of returns compiled by him from a mail questionnaire survey distributed to the members of both associations by Joseph Zahn, Manager of the National Hand Embroiderers and Novelty Manufacturers Association (R. 1304-1313, 1338-1367). The summary showed the average age of the

[fol. 68] of America, Inc., New York, New York;[95] Pleaters, Stitchers and Embroidery Manufacturers Association, Inc., Chicago, Illinois;[96] Fixler Bros., Chicago, Illinois;[97] and seven concerns engaged in bullion embroidery of military and naval insignia devices in New York, New York.[98]

Briefs were filed in opposition to the restriction or prohibition of home work in the Industry on behalf of the Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York; the National Hand Embroiderers and Novelty Manufacturers Association and Associated [fol. 69] Manufacturers of Tubular Pipings and Trimmings, New York, New York; Pleaters, Stitchers and Embroidery Manufacturers Association, Inc., Chicago, Illinois; and Gemsco, Inc., Vanguard Military Equipment Corporation et al. Counsel for all of these associations and concerns except the Chicago association and for the International

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home worker covered, average weekly earnings, marital status, average number of children per home work, other dependents, willingness to work in a factory, and other information.

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[95] The Veil Dotters' Association of America, Inc., New York, New York, was represented by Barnett W. Landau, its Executive Director (R. 905-925, 1672-1684).

[96] The Pleaters, Stitchers and Embroidery Manufacturers Association, Inc., Chicago, Illinois, was represented by its counsel, Irvin H. Weiss, and its President, Martin Somers, Chicago, Illinois.

[97] Fixler Bros., Chicago, Illinois, was represented by its counsel, Joseph L. McCormack, Chicago, Illinois (R. 926-940).

[98] Gemsco, Inc., Marz Company, Hertz Company, Tubell and Company, Hilborn Hamberger and Company, C. Hirsch and Sons, and Vanguard Military Equipment Corporation, New York, New York, concerns engaged in bullion embroidery of military and naval insignia devices were represented by Samuel S. Allan, Counsel, New York, New York, and Seymour Altmark, Associate Counsel, New York, New York (R. 1440-1474).

Ladies' Garment Workers' Union, appeared at the oral argument before me on January 26, 1943.[99]

At the opening of the hearing motions to dismiss the hearing "with respect to the possible prohibition of home work" were submitted to the Presiding Officer by counsel for the Pleaters, Stitchers and Embroiderers Association, Inc., and the National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pipings and Trimmings, New York City. It was contended that: (1) There is no statutory authorization by which the Administrator may prohibit home work in the Industry; (2) prohibition of home work would violate the constitutional rights of both employers and home workers; and (3) prohibition of home work by the Administrator would involve an unlawful assumption by him of the duties and functions of Congress.[100] The Presiding Officer denied the motions, stating:

> The question is a legal one which I do not presume to pass upon. My ruling must be made on the basis of the possibility of conflict here, of opposing legal views being right, and I shall follow the regular procedure of overruling the motion and continuing with the hearing • • • [101]

[fol. 70] At the conclusion of the hearing the motions were renewed upon the same grounds and upon the further allegations that (1) the evidence establishes that the minimum wage to be fixed as a result of this proceeding is not in jeopardy, (2) prohibition of home work is not supported by the evidence, and (3) the evidence satisfactorily establishes that home workers in the Industry make the minimum wage. These motions were also denied by the Presiding Officer.[102]

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[99] The scope of the opposition in the Industry to the restriction or prohibition of home work in terms of the employers who will be affected thereby is considered hereafter in this Opinion.

[100] R. 7-12.

[101] R. 10.

[102] R. 1688-1689. The sufficiency of the evidence adduced at the hearing to support restriction or prohibition of industrial home work in the Embroideries Industry is considered in detail hereafter in this Opinion (*infra*. pp. 64-117).

Samuel S. Allan, Counsel for manufacturers of military and naval insignia devices, also contended (1) that the definition of the Industry excludes military embroiderers and "no evidence whatsoever has been offered by the Government or by the proponents to include such embroiderers in this proceeding"; (2) that military embroiderers are of a class separate and apart from the embroiderers and crochet beaders covered by the definition; and (3) that the Committee's recommendation of a 40-cent minimum wage rate does not confer upon the Administrator any right or power to conduct a hearing with respect to abolishing or prohibiting the employment of home workers in the Industry. It was also contended that the calling of the hearing was arbitrary, unreasonable and capricious.[103] The Presiding Officer also denied these motions upon the basis that he had no authority to dismiss the hearing.[104]

The motions by counsel involve two distinct, although related, questions: (1) my authority under the Act to hold a hearing to determine what terms and conditions with respect to industrial home work, if any, are necessary in [fol. 71] any wage order issued in this proceeding in order to carry out the purpose of such order, to prevent its circumvention or evasion, and to safeguard the minimum wage rates established therein; and (2) in the event that I find that it is necessary to include in the wage order terms and conditions regulating, restricting or prohibiting industrial home work, my authority so to regulate, restrict or prohibit. With respect to the first of these questions, this hearing was called to enable all interested persons to express their views and to submit such evidence as they deemed appropriate upon the issues stated in the notice. The hearing on the Committee's minimum wage recommendation was broadened to include the question of the necessity for terms and conditions regulating, restricting or prohibiting home work, not because there is anything in Section 8(f) which requires me to hold a hearing on the matters which I am required by that section to deter-

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[103] R. 10-12, 1687. Points (1) and (2) of Mr. Allan's contentions are discussed in an earlier section of this Opinion (*ante*, pp. 8-11).

[104] R. 1686, 1688-1689.

mine,[105] but because I determined that an investigation should be made and an opportunity afforded to interested persons in the Industry to express their views, submit relevant evidence and offer such argument on the evidence and the law as would enable me to exercise an informed judgment and to reach a sound and reasonable conclusion on the question. A similar procedure has been followed in the case of six other industries in the apparel and related fields, namely, the Jewelry Manufacturing, Knitted Outerwear, Women's Apparel, Gloves and Mittens, Button and Buckle Manufacturing and Handkerchief Manufactur-
[fol. 72] ing Industries.[106] The issue at the hearing was "*what, if any, prohibition, restriction, or regulation* of home work in this industry is necessary *to carry out the purpose of* • • • [any wage order issued in this proceeding] *to prevent the circumvention or evasion thereof, and to safeguard the minimum* wage rate established therein."[107] (Italics supplied.) In making this one of the questions to be determined upon the basis of the evidence adduced at the hearing, the notice was clearly in accordance with the intent of Section 8(f). I conclude that the Presiding Officer's action in overruling the motions to dismiss the hearing with re-

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[105] Congress provided in Section 8(d) of the Act that the Administrator shall approve or disapprove an industry committee's recommendation only "after due notice to interested persons, and giving them an opportunity to be heard." No such specific requirement is made in the Act, however, with respect to the Administrator's determination of the terms and conditions necessary to carry out a wage order, to prevent its circumvention or evasion, and safeguard the minimum wage rate or rates established therein.

[106] See the Findings and Opinion of former Administrator Philip B. Fleming on the minimum wage recommendation of Industry Committee No. 26 for, and industrial home work in, the Jewelry Manufacturing Industry, dated October 16, 1941, and my Findings and Opinion on the minimum wage recommendations for, and industrial home work in, the Knitted Outerwear Industry (March 30, 1942), Women's Apparel Industry (July 8, 1942), Gloves and Mittens Industry (August 22, 1942), Button and Buckle Manufacturing Industry (September 19, 1942), and Handkerchief Manufacturing Industry (January 22, 1943).

[107] Administrator's Exhibit 1-F.

spect to the home work question in the Embroideries Industry was proper.[108]

I have also considered the second question raised by the motions to dismiss the hearing, namely, my authority to [fol. 73] regulate, restrict or prohibit industrial home work in the Industry in the event that I find that it is necessary to do so in conformity with Section 8(f) of the Act. The ultimate tribunal for the determination of this question is, of course, the courts. I must, nevertheless, rule upon the objections which are before me that the Administrator does not have authority under Section 8(f) of the Act to prohibit, restrict or regulate home work in the Industry. A careful study was made of the language of Section 8(f), its legislative history and the administrative experience of the Wage and Hour Division with respect to the enforcement of minimum wages for home workers by Administrator Fleming before the first hearing was held and an order prohibiting home work was issued in the Jewelry Manufacturing Industry. I reviewed the legal, economic, and administrative bases of action before determining that it was appropriate to proceed in other industries. It is my considered opinion that the Administrator has the legal authority asserted in this proceeding and, accordingly, I must overrule the objections addressed to the question of my authority.

The Presiding Officer rendered numerous rulings on the admissibility of evidence. It is not necessary to refer to

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[108] Prohibition of home work was strongly urged by a number of agencies and organizations, including the Division of Labor Standards, United States Department of Labor; the Division of Women in Industry and Minimum Wage, New York Department of Labor; the Division of Women and Children, Rhode Island Department of Labor; and the International Ladies' Garment Workers' Union. Other proposals were advanced at the hearing, together with supporting evidence and argument, including a proposal for regulation of home work offered by the President of the Pleaters, Stitchers, and Embroiderers Association, Inc. of New York City (R. 1099; see also transcript, oral argument, p. 101.) All proposals on the question stated in the notice of hearing are before me for consideration in this proceeding, not merely proposals for restriction or prohibition.

every instance of such rulings which occurred in the course of the hearing. As provided in the rules of hearing which were set forth in the notice thereof, the Presiding Officer was not bound to observe the rules of evidence prevailing in courts of law or equity in determining the admissibility of documentary evidence, or the propriety of direct or cross-examination. This is an administrative proceeding in which the hearing is intended to serve as a means of providing a full and fair opportunity to all interested persons of making known their views and of supplying appropriate information and evidence for my consideration in deciding the questions which were its subject matter. The Presiding Officer allowed full scope for the introduction of evidence and cross-examining witnesses. All interested persons had [fol. 74] ample opportunity to present their views and evidence, and to test as closely as possible by cross-examination the views and evidence of all witnesses who testified. Since this was plainly in accord with the purpose of the hearing, namely, to secure all the relevant facts available, I am of the firm conviction that no substantial error can be found in the Presiding Officer's conduct of the hearing.[110] Upon a careful appraisal of the transcript of the hearing and the exhibits made a part of the record, as well as those excluded from the record as shown by the transcript, I conclude that the hearing as conducted by the Presiding Officer furnished a full and fair opportunity to all interested persons to present their views and supporting evidence on the matters at issue in this proceeding, that full opportunity

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[110] Although it was contended at the oral argument that witnesses for the Administrator and the union were evasive in answering questions, it was stated by counsel of one of the associations opposing any restriction or regulation of home work:

> "No, I don't think there was anything improper in the manner of conducting the hearing. I tried to make it clear that the Presiding Officer is not bound by the rules of procedure as in the state courts" and "We acknowledge we were allowed a complete hearing, and we were permitted to cross-examine all the witnesses all we wanted to, and we were permitted to call all the witnesses we desired" (transcript, oral argument, pp. 33, 35-36).

for cross-examination of witnesses was afforded, and that due process was observed by the Presiding Officer throughout the hearing.

A number of matters, however, appear to require special comment. Upon objection by counsel for the Pleaters, Stitchers and Embroiderers Association, Inc. of New York City, the National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pipings and Trimmings, the Pleaters, Stitchers and Embroidery Manufacturers Association of Chicago, Illinois, and manufacturers of military and naval insignia [fol. 75] devices, the Presiding Officer denied an offer of counsel for the Division to incorporate into the record by reference the records of hearings held in similar proceedings for the Knitted Outerwear and Women's Apparel Industries. His denial was based upon the ground that, although this had been done without objection in other similar proceedings, the records in question consisted of the testimony of persons who were not available for cross-examination and were not, therefore, admissible under the rules of the hearing. Exceptions were noted by counsel for the Division, the Pleaters, Stitchers and Embroiderers Association of Philadelphia, Pennsylvania, and the International Ladies' Garment Workers' Union.[111]

The documents in question are the records of official proceedings held at the direction of the Administrator. Minimum wage orders which provided for prohibition of industrial home work in the industries involved, except under certain limited conditions, have been issued as a result thereof.[112] Counsel for the Division stated that the prin-

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[111] R. 37-41. Exceptions were also taken to the Presiding Officer's denial of motion to exclude testimony relating to the Knitted Outerwear, Women's Apparel and other related industries and to the relationship between child labor and minimum wage standards on the ground that such testimony was irrelevant and immaterial. See R. 32-34; 59-61; 66-67; 300-301; 663-666; 675-677; 1591. I have considered these objections to the conduct of the proceeding, and I conclude that the Presiding Officer's action in overruling the objections was proper.

[112] Title 29, c. V, Code of Federal Regulations, Parts 617 and 617.100 and 605 and 605.100.

cipal purpose of his motion to include these documents by reference in the record of this proceeding was to indicate to the parties at the hearing that the Administrator might take special cognizance of such records in deciding the questions before him.[113]

[fol. 76] The record shows that the Embroideries Industry, while a separate and distinct industry, is related to various other industries.[114] It services particularly the Women's Apparel, Knitted Outerwear and Handkerchief Manufacturing Industries. It was the view of many of the representatives of State and Federal agencies and others who testified at the hearing that the home work problem in the Embroideries Industry has a direct bearing upon the maintenance of minimum wage standards provided by wage order in the industries which it serves.[115]

The offer, for the purpose indicated was, in my judgment, proper and was calculated to inform all of the interested parties of the special relevance of the records in question in determining what, if any, prohibition, restriction or regulation of home work in the Embroideries Industry is necessary to safeguard the recommended minimum wage rate if and when that rate were put into effect by wage order. I conclude, however, that no substantial interest of any of the parties at the hearing was prejudiced by the Presiding Officer's refusal to include the records of the home work proceedings in the Knitted Outerwear and Women's Apparel Industries in the record of this proceeding. I shall take these records into account to the extent that official notice of their contents is permissible.

Counsel for the embroidery associations and manufacturers opposing the restriction or prohibition of home work moved to strike from the record three reports prepared by

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[113] R. 38-39. As to the status of records of proceedings under Section 8 of the Act, see also Section 10(a) of the Act.

[114] Administrator's Exhibit 9, p. 1; Administrator's Exhibit 4, p. 1; Administrator's Exhibit 2, p. 1; Weiss, R. 21-22; Ackroyd, R. 89-90; Dahl, R. 351; Nachmann, R. 409-410 Friedensohn, R. 996; Orloff, R. 1093-1095; Weinberg, R. 33, 1399, 1610; Papert, R. 1478.

[115] Ackroyd, R. 89-90; Beyer, R. 149-171; Dahl, R. 351-352; Cherashore, R. 369; Weinberg, R. 1579; see International Ladies' Garment Workers' Union Exhibit 5, pp. 26-27.

the Economics Branch, Wage and Hour Division, United [fol. 77] States Department of Labor, consisting of data on conditions in the Embroideries Industry and on industrial home work in the Industry. It was contended that two of these exhibits [116] were not primarily concerned with home work [117] and that the third,[118] which admittedly dealt exclusively and the current status of home work in the industry, was "not the best available report that could have been prepared for the purposes of the hearing".[119] These motions were overruled by the Presiding Officer.

The first two reports were offered for the record primarily for such bearing as they had on the appropriateness of the minimum wage recommendation which was also a subject matter of the hearing. To the extent that they disclosed data on conditions in the Industry, their inclusion in the record was clearly appropriate for this purpose.[120] It is also clear that insofar as they contained material bearing on the home work question their inclusion in the record was also appropriate with respect to this question. In the light of the purpose of the hearing, I conclude that the two reports in question were properly included in the record for the purposes indicated.[121]

The objection to the report entitled *The Current Status of Home Work in the Embroideries Industry*, October [fol. 78] 1942,[122] went to its probative force rather than to the propriety of its inclusion in the record of the hearing. All parties present had an ample opportunity to examine, check, amplify or disprove the facts set forth in the report and to adduce additional evidentiary material. They were

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[116] Administrator's Exhibits 2 and 4.

[117] R. 676-677.

[118] Administrator's Exhibit 9.

[119] R. 677.

[120] See the testimony of Verl E. Roberts, Acting Chief, Industry Committee Studies Section, Economics Branch (R. 13-15).

[121] It may be noted that the reports in question were used extensively by counsel for the embroidery manufacturers in their cross-examination of Harry Weiss, Director, Economics Branch (R. 499-500, 552-553, 555-556, 576-600, 622, 654-661).

[122] Administrator's Exhibit 9.

also given the opportunity to question at length the Director of the Economics Branch under whose direction the report was prepared.[123] His testimony clearly disclosed that the report contains relevant information on the questions which are before me in this proceeding.[124] In view of the nature of this proceeding, and the circumstances referred to, I conclude that the report was properly admitted into the record by the Presiding Officer.

Counsel for the embroidery associations and manufacturers opposed to the restriction or prohibition of home work objected to inclusion in the record of documentary material offered by the Division of Labor Standards, United States Department of Labor.[125] Consideration of these exhibits, the grounds asserted by counsel, and the reasons advanced by the Presiding Officer for including each of these exhibits in the record clearly indicate that the Presiding Officer's action in overruling the objections was entirely proper.[126] Considering the purpose of this pro-

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[123] R. 488-677.

[124] R. 667-674.

[125] Division of Labor Standards Exhibits 1-10, 12-25, inclusive. Division of Labor Standards Exhibit 11, being a copy of the New Jersey Industrial Home Work Law (Laws of 1941, c. 308, July 28, 1941) was admitted without objection.

[126] Division of Labor Standards Exhibits 1, 2, and 3 were originally excluded from the record by the Presiding Officer under rule 7 of the rules of hearing (Administrator's Exhibit 1-F; R. 252, 262). Upon there being made available for perusal by the parties at the hearing the complete transcripts and documents from which the exhibits were excerpted, the Presiding Officer ruled that they might be included in the record as containing background material designed to enable the Administrator to consider the home work problem in the Embroideries Industry in its proper perspective (R. 1388-1393).

Division of Labor Standards Exhibits 4, 5, 9, 14, and 19 were objected to on the grounds that the material contained therein was too remote from the date of the hearing to have any bearing on its subject matter, and that they related to conditions existing prior to enactment of the Fair Labor Standards Act. These exhibits were admitted by

ceeding, I conclude that this material was properly included in the record of this proceeding.

[fol. 79] Over the objection of counsel for the Division and the International Ladies' Garment Workers' Union, the Presiding Officer excluded from the record four exhibits offered by the New York Department of Labor, consisting of Home Work Orders Nos. 1-4 prohibiting industrial home work in the Men's and Boys' Clothing, Men's and Boys' Neckwear, Artificial Flower and Feather, and Glove In-

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the Presiding Officer who remarked that "My view of the matter is that the Administrator would hardly wish to make a determination of this matter without familiarity with the historical background of the question involved, and I think that the exhibit properly belongs in the record" (R. 1370). See R. 1369-1370, 1373-1374, 1377-1378, 1381-1384. An additional ground of objection was raised to Exhibits 6, 7, 8, 15, 16, 17, 18, 20, 21, 22, 23, 24, and 25 that they contained statements of persons who were not available for cross-examination. The Presiding Officer correctly pointed out, however: "Now, my conception is that the usefulness of this article from the Social Service Review which is under review to the Administrator in his determination of this matter would be merely the aid it gives him in properly weighing the factual evidence that is contained in the record from witnesses, and I see no reason for its exclusion" (R. 1372). See R., 1370-1373, 1379-1381, 1384-1388.

With respect to Division of Labor Standards Exhibit 10, objection was made to inclusion in the record of "that portion of the exhibit which does not refer to the statutory legislation but is confined to observations or comments in connection with the statutory legislation referred to in the exhibit upon the grounds that the person who prepared such comments has not been made available for cross-examination" (R. 1374). The Presiding Officer overruled the objection and admitted the exhibit "because of the historical nature of the exhibit referred to" (R. 1374). Objection was made to Division of Labor Standards Exhibit 12 upon the ground that "men's neckwear is not included in the definition of the embroidery industry as contained in the notice of this hearing" and upon the further ground that the authors were not available for cross-examination (R. 1375). The Presiding Officer admitted the exhibit, remarking: "I

[fol. 80] dustries in the State of New York.[127] The documents in question are official orders of the State of New [fol. 81] York of which I may, of course, take official notice. The Presiding Officer's ruling did not, as he stated explicitly, bar the orders from my consideration. In view of this fact, and in view also of the fact that the principal parties who might claim to be prejudiced by the Presiding Officer's ruling were the ones who objected to inclusion of the orders in

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would have to be shown * * * there is no common home work problem in the men's neckwear industry and the embroidery industry to support your motion for the exclusion of Exhibit 12 of the Division of Labor Standards from the record * * *" (R. 1375). Finally, objection was made to Division of Labor Standards Exhibit 13 that it was too remote and that "The reference therein contained under paragraph 11, Section 5, has not been shown to have had any bearing upon conditions prevailing in the embroidery industry and is, therefore, immaterial and irrelevant" (R. 1376-1377). The Presiding Officer admitted this exhibit, stating: "Although I agree with you respecting your statement as to the comment in paragraph 11, page 5, of this exhibit we are referring to, I also understand that the Administrator would not view that at all as proven evidence and that this is merely of an historical nature * * *" (R. 1377).

It may be observed that by far the greatest part of the documentary material submitted by the Division of Labor Standards consisted of portions of official transcripts of hearings conducted by the National Recovery Administration, official orders or reports of Federal and State agencies, and resolutions and reports of the International Association of Governmental Labor Officials and the National Conference on Labor Legislation. Division of Labor Standards Exhibits 6, 15, and 21 consisted of articles in reputable journals by experts in the field of labor and social legislation.

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[127] R. 1489-1497. The Presiding Officer stated: "Now, the documents offered as Exhibits Nos. 1 to 4 * * * are not * * * of an historical nature. They are patterns set by the State of New York for the prohibition and regulation of homework, not in the industry under consideration, but 4 other industries. I do not conceive that these

the record, I conclude that his refusal so to include them was not prejudicial to any of the interested persons in this proceeding.

I. Need for Terms and Conditions on Home Work in the Embroideries Industry

Industrial home work as an economic and social problem is not new, nor is it confined to the Embroideries Industry. The general nature of industrial home work and the difficulties of control which exist in other industries where home workers are employed have been considered in other hearings where the home work question was involved.[128] This proceeding is not concerned with the question whether home work is desirable or undesirable from a social point of view or as a form of economic organization. It is concerned solely with whether the home work system in the Embroideries Industry furnishes a means of circumventing or evading a wage order putting into effect the minimum wage recommendation of Industry Committee No. 45 so

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orders if included in the records are of a nature to influence the Administrator in his primary determination of the question whether homework should be regulated at all or not. I do conceive that if his determination on the basis of the other evidence in the record would be that homework ought to be regulated, then these orders might serve as a pattern to him for stating how, in what way, it should be regulated. The argument in support of the objection to the inclusion of these in the record * * * that they are of a prejudicial nature has some weight with me. In view of the fact that these orders will be available to the Administrator after he has reached a determination to regulate homework or to prohibit homework, if he should reach such a decision,—I am going to rule that they may not be accepted for the record" (R. 1496).

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[128] See Findings and Opinions of the Administrator in the matter of minimum wage recommendations for, and industrial home work in, the Jewelry Manufacturing Industry, Women's Apparel Industry, Knitted Outerwear Industry, Gloves and Mittens Industry, Button and Buckle Manufacturing Industry, and Handkerchief Manufacturing Industry.

that it is necessary to provide in the wage order for its regulation, restriction or prohibition in order to carry out the purposes of such order and to safeguard the minimum wage rate established therein.

[fol. 82] A. Home Work in the Embroideries Industry

The Embroideries Industry produces primarily for manufacturers of apparel and apparel accessories. It also serves producers of other articles such as shoes, handbags, art linen, draperies and curtains, lamp shades, upholstery and similar articles.[129]

The Industry may be regarded, for descriptive purposes, as falling into four major types of embroidery products or processes: (1) Schiffli machine products, (2) Swiss hand-machine embroidery, (3) Bonnaz, stitching, pleating, crochet beading, tucking, piping, passementerie and hand embroideries, and other forms of embroidery, and (4) trimmings, bindings and stamped art goods.[130] This division is based upon the major types of embroidery performed in the Industry. It does not, however, represent any clear cut grouping of embroidery establishments. Such a grouping of plants is not possible. Many plants are engaged in a large number of different types of embroidery within a particular branch or among different branches.[131]

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[129] Administrator's Exhibit 4, pp. 1 and 2; Administrator's Exhibit 2, pp. 1 and 2. The allocation of processes and products is based upon opinions of representative employers and spokesmen of trade associations and labor unions as given to field investigators of the Wage and Hour Division (Administrator's Exhibit 2, p. 2).

[130] For purposes of brevity these four divisions will be referred to as (1) the Schiffli branch, (2) the Swiss branch, (3) the Bonnaz and hand embroideries branch, and (4) the trimmings and art goods branch.

[131] Some of the branches produce the same products, such as emblems. Administrator's Exhibit 2, p. 2. The Census of Manufacturers for 1939 grouped the plants in the Industry according to their principal products into the classifications "Schiffli machine products"; "Embroideries—other than Schiffli"; and "Trimmings (not made in textile mills), stamped art goods, and art needlework." The Industry through its trade associations recognizes Bonnaz and hand

[fol. 83] Power-driven Schiffli machines are used to produce imitations of hand embroidery on yard goods and, to a lesser extent, on "frame" goods such as handkerchiefs, ladies' neckwear, and women's underwear.[132] Home work is not employed in such production to any appreciable extent.[133] Home work operations include machine mending of imperfections and hand cutting of designs, bands, edges, and threads.[134]

Manually operated Swiss hand-loom machines are used to produce a reproduction of hand embroidery. This type of embroidery competes with hand embroidery on handkerchiefs, art linens, children's apparel and similar articles.[135] Concerns using Swiss hand-loom machines also employ only a few home workers.[136] Most of the establishments are "family shops" in which the owner and members of his family do the greater part of the work.[137]

Bonnaz and hand embroidery are commonly performed in the same plants. Some types of work included in this group of embroidery processes are strictly machine processes and are performed almost exclusively by factory workers, as for example, Bonnaz (a machine-made imitation of hand embroidery), pleating and machine drawing. [fol. 84] On the other hand, some embroidery may be performed either by machine or hand and is done by both plant workers and home workers. Operations in this category

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embroideries, crochet beading, stitching, tucking, pleating, piping, passementerie, and allied forms of embellishment as one division of the Industry. Swiss hand-machine embroidery and stamped art goods represent types of embroidery different from such operations. Administrator's Exhibit 4, p. 4. See also Friedensohn, R. 992, 1060-1063, 1086; Meyerson, R. 1221-1223; Geller, R. 1235; Alpine, R. 1248-1250; Ganz, R. 1268; Sprung, R. 1458, 1461-1463.

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[132] Administrator's Exhibit 2, pp. 41, 42.

[133] Administrator's Exhibit 4, p. 30.

[134] Administrator's Exhibit 9, p. 13.

[135] Administrator's Exhibit 2, p. 41.

[136] Administrator's Exhibit 9, p. 13.

[137] Administrator's Exhibit 4, pp. 4, 9. This applies equally to the Schiffli embroidery.

include ornamental stitching, tucking, shirring, smocking, hemstitching, fagoting, appliqueing, eyeleting, thread, splitting, embroidery thread cutting, scallop cutting, lace cutting, straight-cutting of embroidery, emblems, nailheads, and rhinestone setting.[138] Additional strictly hand operations, such as hand embroidery, hand rolling, crochet beading, rhinestone trimming, sequin and spangle trimming, passementerie, lace making up, making up of embroidery yard goods, cutting out of embroidery and veil dotting, are performed to some extent by factory workers but principally by home workers.[139]

Plants which manufacture trimmings and bindings produce some products similar to those of the Bonnaz and hand embroidery branch such as fagoting, bindings, piping and passementerie. These operations involve both machine and hand work and are performed by both plant workers and home workers. In the production of stamped art goods, textile fabric and articles are stamped with designs to be worked later by the purchaser of such items. Home workers are employed to make "models" which are used for display purposes.[140]

The great bulk of home work in the Embroideries Industry is concentrated in the State of New York. The [fol. 85] States of New Jersey, Pennsylvania, and Illinois rank next in importance in the order named.[141] Home work in embroideries is also found in Massachusetts, Missouri, Maryland, California, and Ohio, as well as in other States.[142]

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[138] Administrator's Exhibit 2, pp. 5-6.

[139] Administrator's Exhibit 2, pp. 4-5; Administrator's Exhibit 9, p. 13. The data contained in the reports of the Economics Branch were supported by the testimony of employers who appeared on behalf of the associations and concerns opposed to the restriction or prohibition of home work.

[140] Administrator's Exhibit 4, pp. 30, 31; McCormack, R. 82, 926-930.

[141] Administrator's Exhibit 4, p. 31; tables 13 and 14, pp. 34 and 35; Administrator's Exhibit 9, tables 8 and 9, pp. 14, 15; Beyer, R. 177; Dahl, R. 352; McCormack, R. 927; Sprung, R. 1441.

[142] Administrator's Exhibit 9, table 3, p. 6; Appendix table 1, pp. 46-47.

The nature of home work is such that estimating the number of home workers employed in the Embroideries Industry is difficult.[143] Data submitted by the Economics Branch contained estimates for the number of home workers employed at peak employment in this Industry between April 1, 1939 and July 15, 1942 ranging from roughly 8,500 to 12,000.[144] Approximately 71 percent were employed by New York firms,[145] about 17 percent by New Jersey firms. Pennsylvania and Illinois establishments accounted for practically all of the remaining home workers.[146] Employment figures for factory workers may, by contrast, be ascertained with relative ease and definiteness. The estimated [fol. 86] number of factory wage earners as of June 1942 was 18,500.[147]

Data based upon the Census of Manufactures which were submitted by the Economics Branch showed that the average number of wage earners per factory in 1,431 establishments employing 17,828 factory workers was between 12 and 13 in 1939. Three percent of all establishments in the Industry averaged more than 50 wage earners per plant. Two-fifths of the establishments employed five or less.

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[143] Administrator's Exhibit 4, p. 30; Administrator's Exhibit 9, p. 2; Weiss, R. 22, 23.

[144] Administrator's Exhibit 9, p, 2; Weiss, R. 23, 24.

[145] According to records of the New York Department of Labor, 327 establishments in the Embroideries Industry in the State were permitted, as of October 21, 1942, to distribute home work and 4,561 home workers held certificates; Papert, R. 1478. Joseph L. McCormack estimated that approximately 500 home workers were employed in the Chicago area in making "models" of art needlework (R. 927).

[146] Administrator's Exhibit 9, p. 2.

[147] Administrator's Exhibit 4, p. 11; table 1, p. 5. Schiffli embroidery accounted for about 4,000 factory workers in June 1942, Swiss hand-machine embroidery for 1,500, Bonnaz and hand embroidery for 10,000, bindings, trimmings and pipings for 2,500, and stamped art goods for 400 or 500. The Census of Manufacturers for 1939 estimated that of the 17,828 factory employees in the Industry 3,750 were in Schiffli shops, 4,797 in "embroidery other than Schiffli," and 9,281 in "Trimmings and stamped art goods."

About 84 percent employed an average of 20 or less per establishment.[148] Data submitted to the Wage and Hour Division by employers acknowledging receipt of home work handbooks during the period from April 1, 1939 to the end of the first six and one-half months of 1942 indicate that embroidery establishments in New York, which employs some 71 percent of all the home workers in the Industry, employed home workers per plant numbering twice the number of factory wage earners per plant in the Industry as a whole.[149] In New York 217 firms had an average of 26 [fol. 87] home workers per firm. On the other hand, 96 New Jersey firms employed only approximately 14 home workers per firm, due probably to the New Jersey Industrial Home Work Law, which, effective July 28, 1941, restricted the number of home workers per plant to one-third of the number of factory workers per establishment.[150] In Pennsylvania, 14 firms had an average of about 9 home workers each.[151]

Home work in the Embroideries Industry is distributed directly to home workers by regular embroidery manufacturers and contractors who own inside shops or indirectly

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[148] Administrator's Exhibit 4, p. 9; table 4, p. 10.

[149] Administrator's Exhibit 9, table 2, p. 4. Not all firms which receive handbooks return acknowledgment forms. On the other hand, not every firm needs to apply for handbooks every year. The data indicate, however, that the average number of home workers per firm has not varied greatly from one year to another. On the basis of home work certificates issued by the State of New York as of October 21, 1942, it appears that the overall ratio of home workers to factory workers in the Embroideries Industry in that State was 4 to 10 (Papert, R. 1478, 1507). J. Alpine, an employer who appeared on behalf of the Pleaters, Stitchers and Embroiderers Association, Inc., of New York City, testified that his firm, the Worth Pleating and Stitching Co. of New York City, performed all types of machine and handmade embroidery. During the height of the season it usually employed 40 inside machine workers and 60 home workers on hand embroidery (R. 1249).

[150] Laws of New Jersey, 1941, c. 308; Division of Labor Standards Exhibit 11.

[151] Administrator's Exhibit 9, table 2, p. 4.

by contract shops or distributors who do not have inside shops.[152] Thus, it is apparent that in many cases the mate- [fol. 88] rial upon which the home worker performs operations passes through several hands before reaching the home worker.[153]

The contention has been advanced by the New York embroidery employers' associations which appeared in opposition to the restriction of prohibition of home work in the Embroideries Industry that the greatest difficulties in the Industry from the point of view of enforcing the Act's minimum wage provisions arise when the home workers are em-

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[152] See Administrator's Exhibit 4, p. 6; Administrator's Exhibit 9, p. 11; Weiss, R. 24, 25. Since by far the greatest part of work in the Embroideries Industry consists of the embellishment of materials, garments or articles of various types produced by garment and other similar manufacturers, contract factories as defined by the Census, predominate in this Industry. Contract shops work on materials and products supplied by manufacturers and jobbers and usually supply only threads or other materials such as beads, sequins, nailheads and the like. Some establishments, especially those engaged in Bonnaz and hand embroidery, also create original designs. Manufacturers who own the raw materials and sell the finished products are designated as regular establishments by the Census. Even though they do not own the basic materials, some contractors consider themselves manufacturers because they contribute original designs and supply secondary materials of substantial value, such as beads, sequins and nailheads, in addition to threads. See Weiss, R. 24, 25.

Distributors generally perform no functions other than receiving work from a particular manufacturer or contractor and distributing this work to home workers directly employed by such distributors. Administrator's Exhibit 9, p. 11; Weiss, R. 25.

[153] Administrator's Exhibit 9, p. 11; see also the testimony of witnesses called by the associations and concerns opposed to the restriction or prohibition of home work; Alpine, R. 1250; McCormack, R. 931; Landau, R. 922-924; Friendensohn, R. 1025, 1026.

ployed by a contractor or a distributor and that statutes enacted by the States of New York and New Jersey have virtually eliminated this problem.[154] These claims are

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[154] See the briefs submitted on behalf of the Pleaters, Stitchers and Embroiderers Association, Inc. (pp. 9-11); National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pipings and Trimmings, Inc. (pp. 14-15); and Manufacturers of Military and Naval Insignia (p. 31).

The New York Act (New York State Department of Labor Exhibit 12) enacted in May 1942 provides as follows:

> "Homework contractor or distributor" means any person who for the account or benefit of an employer delivers to a homeworker or any other person not engaged by such employer articles or materials to be manufactured in a home and thereafter to be returned to said person or otherwise disposed of in accordance with his direction. (Sec. 350 sub. 2-h, Labor Law—Amendment)
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> Distribution of homework to employees by employer. The employer shall, wherever homework is permitted, distribute directly to his homeworkers, all material and articles of homework. No employer shall give out any material or articles for homework through any homework contractors or distributors. No homework contractors or distributors shall receive or distribute any materials or articles for or as a result of industrial homework.
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> This prohibition shall be deemed absolute; anything in this article to the contrary notwithstanding, and shall not be subject to the powers of the industrial commissioner under section three hundred fifty-one. (Sec. 453-a, Labor Law—Amendment)
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> • • • • • • •
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> Employment status of industrial homeworkers. All industrial homeworkers shall be presumed to be employees of their employer and not independent contractors. (Sec. 361-a, Labor Law—Amendment)

[fol. 89] based more on argument than on evidence. Miss Kate Papert, Director, Division of Women in Industry and Minimum Wage, New York Department of Labor, testified that a survey made by the Department in 1941 and 1942 showed that the number of home workers employed by contractors and distributors constituted a minority of the total number of home workers in New York.[155] The statutes in [fol. 90] question do not eliminate the distributor problem insofar as it may exist in States other than New York and New Jersey, nor do they prevent manufacturers in New York and New Jersey from sending work to distributors in other States where no ban on the distributor exists.

With respect to home work contractors and distributors

The New Jersey Industrial Home Work Law, Laws of 1941, c. 308, July 28, 1941 (Division of Labor Standards Exhibit 11), provides in part as follows:

> (b) Industrial home work shall be performed under subsection (a) of this section only where:
>
> (1) the employer maintains a factory or business in this State in which persons are employed on operations which are the same or similar to the home work operations permitted and, provided further, that the commissioner shall determine the ratio, which shall not exceed one-third, of the number of home workers engaged by an employer to the number of persons employed by said employer in his factory or business, said determination to be based on conditions of employment, maintenance of existing labor standards and other factors involving the preservation of the best interests of this State;
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> (2) on any operation, a home worker is paid at least the same rate as that paid to workers on the same or similar operations in the factory or business; and
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> (3) the employer and home worker comply with such other terms or conditions as the commissioner may by rule or regulation prescribe to safeguard the health and welfare of home workers and the wages and working conditions of factory workers, and to effectuate the purpose of this section.

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[155] R. 1501-1503, 1525, 1526.

in New York and New Jersey it is clear from the evidence in the record that while important sources of disregard for and evasion of minimum wages and other standards have at least in part been eliminated by the legislation in these States, violations of the minimum wage, overtime, child labor and record-keeping provisions of the Act are by no means limited to contractors and distributors.[156] Furthermore, the New Jersey statute does not prohibit the contractor or even the distributor as such. It requires him to maintain "a factory or business • • • in which persons are employed on operations which are the same or similar to the home work operations permitted" and limits the number of homeworkers per establishment to not more than one-third the number of persons employed in the factory or business. While the New Jersey statute has undoubtedly had a beneficial effect upon the compliance record of the Industry, the nature of home work is such as to make it very difficult for the Wage and Hour Division to secure the minimum wages required under the Act for home workers.[157] The New York statute prohibits any employer from giving [fol. 91] out any material or articles for home work through home work contractors or distributors, but the effect of this prohibition is limited by the definition of "contractors and distributors" contained in the statute.[158] Miss Kate Papert, Director of the Division of Women in Industry and Minimum Wage, New York Department of Labor, stated that in interpreting the statute:

> • • • we rely largely on the language of the thing itself and as distinguished from employer a contractor

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[156] Administrator's Exhibit 9, table 22, p. 44. Of 147 firms found by the Wage and Hour Division upon inspection to be in violation of the minimum wage provisions of the Act during the period from October 24, 1938 to July 1, 1942, 63 were manufacturers and 84 were contractors.

[157] Cheesman, R. 135-136. Mr. Cheesman, Supervising Inspector, Newark Branch Office, Region II, Wage and Hour Division, testified that the New Jersey statute has not abolished the embroidery contractors who dominate, as contrasted with embroidery manufacturers, in that State, although it has limited their former freedom of organization and operation to a considerable extent (R. 139).

[158] New York Department of Labor Exhibit 12.

> is a person who has from a practical standpoint no financial interest in the article other than the profit he will get from the distribution, from the wages of the homeworkers. In other words, an employer, in reverse, is someone who has a financial stake, has a place of business, owns the material, and the contractor merely distributes to the workers and gets a rake off from that distribution.[159]

She stated further that—

> The fact that * * * [the contractor] has a shop wouldn't necessarily make him an employer. It depends upon all the other factors in the situation [A] person who is responsible for the design, who owns the materials. * * * He is regarded as a manufacturer. * * * For instance, the man who did embroidery, chochet beading, for example, owned the beads, made the pattern, and did all the work on it, and sold it as a piece of work he was doing for a dress manufacturer, he is an embroidery manufacturer. * * * But may I make clear that the facts often have to be determined [fol. 92] on an individual basis, since there are variations?[160]

Miss Papert confirmed the explanation contained in the report of the Economics Branch, Wage and Hour Division, on the status of home work in the Industry, that—

> * * * All home work must now be distributed directly to the home workers by the owner of the material. The New York State Department of Labor has held, however, that embroidery firms, although in fact contractors because they do not own the fabric or articles processed, are manufacturers when they add something of substantive value, as for example, designs and materials of value. Distributors, as well as contractors who add only labor, or only thread and labor, must cease operations.[161]

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[159] R. 1539.

[160] R. 1539-1540.

[161] Administrator's Exhibit 9, p. 24; R. 1540.

Barnett W. Landau, Executive Director of the Vail Dotters' Association of America, Inc., New York, testified:

> The members of my association * * * are basically contractors or distributors, and they are permitted to continue this operation of distributing homework at this time in spite of the existence of the New York State law prohibiting it, because of an official decision handed down by the legal division of the State of New York, giving us the status of employers rather than distributors.[162]

[fol. 93] Similarly, in the case of crochet beading, embroidery concerns often supply beads and other materials, and quite commonly the designs.[163] In the embroidery of military and naval insignia devices for officers also the embroiderer supplies the cloth, bullion thread and other materials. This work is performed in compliance with Army and Navy specifications.[164]

It is apparent from the evidence in the record that, although the distributor who maintains no shop and who performs no function except to distribute work to home workers either for a manufacturer or a contractor who has been eliminated by statute in New Jersey and New York, the contract system itself has by no means been eliminated. It appears likely that a considerable number of former distributors have established shops of their own in the vicinity of their home workers, where they continue to operate within the confines of the New York and New Jersey laws.[165] Others, of course, have probably become employees of

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[162] R. 921. Veiling is given out by jobber manufacturers to veil dotting concerns which employ plant workers to cut it into different patterns or sizes and which then distribute the cut material, together with additional material such as chenille, to home workers "and the actual processing of veil dotting is done by the home workers in their homes, placing the strips or bits of chenille onto the veil either in pattern form or in straight form and twisted to simulate a dot, some being small, others being large" (R. 923-924).

[163] Administrator's Exhibits 2, p. 44; 4, p. 6; and 9, p. 11.

[164] Sprung, R. 1441, 1452-1454; Samuel S. Allan Exhibit 2.

[165] Administrator's Exhibit 9, p. 24.

manufacturers and their former home workers are carried on the pay rolls of the manufacturers.[166] However that may be, it is clear that violations of the minimum wage provisions of the Act are not limited to distributors, and that manufacturers and contractors in the Industry who qualify as legal distributors of home work under the New Jersey and New York laws are also found in a great many cases to be in violation of those provisions.[167]

[fol. 94] Nathan Weinberg, Associate Research Director, International Ladies' Garment Workers' Union, testified:

> The position has been taken that the contract system is the root of most of the evils connected with home work. In our experience with the home work system we have found that the main difficulty with the contract system is that it permits evasion of responsibility. The distributor passes the buck to the contractor, who in turn blames the manufacturer. But we have found very often that the manufacturer is the one basically at fault, because he doesn't pay the contractor or distributor high enough sums to permit the payment of the minimum wage to the home worker. This evil is not eliminated in the embroidery industry by the New York law prohibiting the continuance of contractors and distributors as defined in that law, because as the embroidery so-called manufacturer functions, he is in essence a contractor. What he can pay for embroidery work depends on what he is paid by manufacturers of dresses, by manufacturers of children's wear, of knitted outerwear or underwear or whatever the particular garment might be. So that there still remains the question of fixing the major responsibility. And in periods where embroidery is not

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[166] *Ibid.*

[167] Administrator's Exhibit 9, tables 21 and 22, pp. 43 and 44. Ackroyd, R. 99; Cheesman, R. 130, 131; Dahl, R. 352; Price, R. 737, 747-749; Weiss, R. 633, 634. Miss Papert testified that violations charged to distributors were in a majority of cases the result of manufacturers not paying the contractors a sufficient amount for the work to assure the payment of minimum wages to the home workers (R. 1534).

> in vogue, competition among embroidery manufacturers becomes extremely severe, and in an attempt to get work from dress and other apparel manufacturers, they tend to underbid each other in order to get whatever work is available. This underbidding often reaches the point where they do not get enough from the dress manufacturers to permit the payment of the minimum wage to their home workers. So that the New York law abolishing the contractor and distributor does not at all solve the situations in so far as the embroiderer is to a great extent a contractor. I might [fol. 95] note, incidentally, that the Census of Manufactures classifies the greatest number of embroidery establishments as contract establishments for the reason that they do not work on materials owned by themselves but on materials furnished them by apparel manufacturers for purposes of having those materials embroidered.[168]

I conclude, upon the evidence in the record, that while the New York and New Jersey laws pro-biting distributors who operate no shops[169] from distributing work to home workers and restricting contractors may have a beneficial effect through the elimination of a wholly irresponsible group of operators in the Industry, they have not changed the economic structure of the Industry as presently carried on.[170] Furthermore, even if the distributors were elimi-

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[168] R. 1599. See also Administrator's Exhibit 9, p. 11; table 7, p. 12.

[169] The New York law also requires that something of substantive value be added by the contractor before he can qualify as an "employer" (New York Department of Labor Exhibit 12).

[170] It was testified by inspectors of the Wage and Hour Division that the New Jersey law had led to an increase in illegal distribution of home work in New Jersey by manufacturers from outside the State and to some extent by manufacturers within the State. Similarly, it was stated that work has been sent to New Jersey to evade the New York law. Cheesman, R. 681, 690; Dahl, R. 351, 352. This evidence was corroborated by Miss Papert for the New

nated the fundamental difficulties of regulating minimum wages for home workers in this Industry would not be resolved.[171]

[fol. 96] B. *Labor Conditions in Industrial Home Work in the Embroideries Industry*

The report of the Economics Branch, Wage and Hour Division, entitled *The Current Status of Home Work in the Embroideries Industry*, October 1942 makes clear that one of the most important factors affecting the earnings and working conditions of home workers in the Embroideries Industry is the great multiplicity of designs and styles.

> The embroideries industry, by its very nature, is very largely dependent upon novel and original designs which producers in the industry continuously strive to create. Variations in designs are constantly being made, since fashions are often short-lived. As these adjustments take place, piece rates must be determined and applied with practically every change in the designs. These changes in the piece rates affect both plant workers and home workers.
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> Because of the multiplicity of designs and styles, few operations in the embroideries industry lend themselves to standardization; this is especially true of home work operations. In addition to hundreds of varieties of designs there is a multiplicity of types of stitches and materials. Even in lace-cutting, which requires no sewing operations but merely the use of scissors for the cutting of laces and embroideries, the same piece of lace may be cut into numerous patterns. For example, one lace-cutting employer, who received work from 40 manufacturers or contractors, distributed different patterns to his home workers almost daily. During a period of six months, another lace-cutting firm received work requiring the cutting of 300 different designs, each of which had a different piece rate.

York Department of Labor and by employers who appeared both in support of and in opposition to the restriction or prohibition of home work in the Industry. See Papert, R. 1534-1535; Nachman, R. 372; Orloff, R. 1167.

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[171] See *infra*, pp. 90-95.

[fol. 97] Piece rates for plant workers can read-ly be checked. In fact, the setting of piece rates to yield predetermined average hourly rates in union shops is carried on by negotiations between the employer and a price committee. In non-union shops, certain workers are timed on each style; after rates have been set, they frequently are modified.

The setting of piece rates to yield the minimum wage for home workers is a much more complex problem than for plant workers. Where the operation is performed in the plant, inspection reports indicate that in the majority of cases the same piece rate is applied to home work though no allowance is made for variations in working conditions or in the organization of the work. Nor is allowance made for the wide range in the productivity of home workers; the employer has little knowledge of the actual productivity of his home workers since he cannot actually measure their working hours.

Other indirect factors also influence the earnings of home workers, such as delivery costs, waiting time, and certain costs of equipment. Some of these costs are not very large. Crochet beaders must provide frames, costing about $2, for their work, as well as crochet needles, but these usually represent initial investments with little replacement. Lace and embroidery cutters must furnish their own shears and pay for sharpening them. On the other hand, the menders of embroidery in the Schiffli and band-machine embroidery branches usually provide their own sewing machines, which represent investments up to about $200. No evidence was found in inspection records of reimbursements by the employers for these expenditures.[172]

[fol. 98] The methods used by embroiderers for setting piece rates for home work operations result in an artificial standard of payment. Piece rates for operations which are performed in the home as well as in the factory are normally the same, whether performed in the home or in the factory, without regard to differences in working conditions.

The most common practice followed in the setting of

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[172] Administrator's Exhibit 9, p. 28.

piece rates for crochet beading, hand embroidery and operations done predominantly in the home appears to be the timing of a sample maker in the factory performing a particular piece of work and applying the rate thus obtained to the home work operation. Of the firms inspected by the Wage and Hour Division during the period from June 1, 1939 to July 1, 1942, a review of 211 showed that 80, or 37.9 percent, fixed piece rates for home workers upon the basis of arbitrary estimates; 73, or 34.6 percent, based the rates for home workers on time tests of plant sample makers; and only 40, or 19 percent, based the piece rates for home workers on time tests of some of the home workers themselves.[173]

The practice of paying home workers upon the basis of artificial rates established by timing a sample maker was corroborated by virtually all of the home workers and home work employers who testified at the hearing. Mrs. Florence Acerbo, a witness for the Pleaters, Stitchers and Embroiderers' Association, Inc., which opposed restriction or prohibition of home work, testified on cross-examination that she did not keep a record of the time consumed on each lot [fol. 99] of work distributed to her, "because as I said before they know already how much, how long a piece takes and some women is naturally faster than others, and maybe in the piece rates it is 2 hours; some could take an hour and a half, or some an hour and three quarters or some just take two hours." [174]

Mrs. Acerbo testified further that the employer takes it for granted that the home worker does not require any longer time to finish the work than the sample makers.[175]

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[173] Administrator's Exhibit 9, table 14, p. 30. Methods of fixing piece rates for home workers were not reported for 18, or 8.5 percent, of the 211 firms. Eleven additional firms reported that their home workers were paid on an hourly basis. These firms were engaged in mending Schiffli and hand-machine embroideries. This is one of the few home work operations performed on machines and is the only work in the Industry for which it is customary to pay hourly rates.

[174] R. 949-950.

[175] R. 950.

Mrs. Jean Pelino, another witness for the same association, testified that the home worker is informed of the price that will be paid, based upon the time required by the sample maker "who is a very experienced worker," and that her pay as a home worker was not based upon the number of hours consumed but upon the piece rates fixed by the employer. She also testified that she occasionally received special work that had to be completed within a given time, and that she might have to work as long as 12 straight hours in order to complete her work within the required time.[176]

Mrs. Angelino Fugero, who also testified for the Pleaters, Stitchers and Embroiderers' Association, Inc., admitted that the time entered in her home work handbook was not the actual number of hours it had taken her to complete the various lots of work shown, but was the time fixed for the work upon the basis of time tests of five or six girls performing the same work in the factory. Once the rate was set by this method, she stated, it was never changed whether or not the work actually took the home worker more or less time than the fixed standard.[177]

[fol. 100] Mrs. Florence White, a witness for the National Hand Embroiderers and Novelty Manufacturers Association, testified that at times she worked as a sample maker and that upon the basis of the time she required to complete the various lots of work assigned to her piece rates were set for other home workers.[178]

Among the employers of home workers who appeared on behalf of the Pleaters, Stitchers, and Embroiderers' Association, Inc., of New York City, Abraham Friedensohn, Public Art Embroidery Company, Inc., admitted that the piece rates fixed for crochet beading were commonly based upon the time required by a sample maker to do the work. He further stated that the home worker was not ordinarily in a position to report the actual hours worked because she was working at home on her own time, that "She works when she wants to and she does her work when she

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[176] R. 888-892.

[177] R. 1184-1189.

[178] R. 1403-1405.

wants to, and when she doesn't want to work, she doesn't." [179]

Jack Orloff, Orloff Sons, Inc., President of the Association, testified that in his plant he employed four or five inside workers who time tested the various crochet beading and hand embroidery jobs.[180]

Another aspect of home work which further complicates the obtaining of accurate data on the earnings of the individual home worker is the fact that the reported individual earnings frequently represent the production of more than one person although only one person appears upon the pay roll records of the embroidery manufacturer or contractor. The Economics Branch reported that:

> Often the reported individual earnings represent the production of more than one person. Home workers [fol. 101] are frequently assisted in their work by other members of the family or by friends, who are not recorded on the embroiderer's pay rolls. For example, one home worker interviewed by an inspector of the Wage and Hour Division admitted that, assisted by members of her family, she had worked twice the number of hours recorded on her handbook upon each lot of work entered. In one case, a home worker reported that she was assisted by her mother and sister. For several weeks they had worked from 8 o'clock in the morning to twelve o'clock at night; the father also helped from seven to twelve o'clock at night. An uncle helped with the shopping and cooking of the meals and little time was consumed in eating. Instead of 70 cents an hour as shown by the entries in her handbook the actual average hourly earnings were about 20 cents an hour.[181]

That additional persons assist the home worker in her work in one way or another, although they receive no compensation therefor from the employer, was also borne out by the testimony of the home workers. Mrs. Lena La-

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[179] R. 1002-1005.

[180] R. 1114-1117. Perry Meyerson, Meyerson Brothers, Inc., testified to the same effect with respect to the practices employed by his concern in fixing piece rates (R. 1197).

[181] Administrator's Exhibit 9, p. 31.

Galente, a home worker who testified on behalf of the Pleaters, Stitchers and Embroiderers Association, Inc. admitted on cross-examination that her sister-in-law commonly brought work to her from her employer and made deliveries of the completed work and that she herself customarily went to the employer's place of business only once a week.[182]

Mrs. Mary Comenzo, another home worker witness who testified for the Association, stated on cross-examination that she started to work on crochet beading at the age of 14, that she worked at home until she went into the factory [fol. 102] at 16, and that while she was engaged in home work at that time—

> • • • there was a girl in the building, and she used to take in work. There was a store downstairs once, and she used to work there, and she really taught me how to work, and then finally I learned how, and then I worked home for a while until I got my experience.[183]

Mrs. Mamie Gangemi and Mrs. Francis Gagliardi, home worker witnesses for the Association, stated that they did not obtain home work from or deliver it to the employer. This was usually done in Mrs. Gangemi's case by her two 14 and 16 year old daughters, and in Mrs. Gagliardi's case by her husband.[184]

Mrs. Anne Locascio, another home worker who appeared for the Association, had been doing beading and spangling since she was 13 years old.[185]

Miss Branson Price, inspector of the Wage and Hour Division, New York Regional Office, testified that it had been found that during rush seasons all available persons in and around the home, including children as well as adults, worked on the goods. In the case of 302 home workers interviewed by her, she found that an additional 174 persons contributed some assistance to these workers. Fifty-eight of these assistants were under 16 years of age.[186]

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[182] R. 1285.

[183] R. 1301.

[184] R. 846, 851, 823.

[185] R. 862-863.

[186] R. 703; see also McConnell, R. 276-277.

Miss Beatrice McConnell, Director, Industrial Division, Children's Bureau, United States Department of Labor, testified [187] concerning the importance of child labor in [fol. 103] tending to undermine minimum wages in the Industry. She stated that child labor has always been recognized as an integral part of the home work system of production since home work is basically a family system.[188] In the case of 7,251 minors found by the Children's Bureau as a result of inspections from October 24, 1938 to July 1, 1942 to be employed in violation of the child labor provisions of the Fair Labor Standards Act,[189] 898 were working in homes. Of the latter 243, or 27 per cent, worked on apparel, accessories, or other finished fabric products. Among the child home workers were 85 doing work for 19 embroidery firms in New York, New Jersey, Pennsylvania, and Illinois.[190] The employment of children below the age of sixteen in either factories or homes in the production of goods for interstate commerce is prohibited by the Act and such employment must, therefore, be hidden. This in itself contributes to the deterioration of minimum wage standards. Child labor is much more easily kept out of sight in home work than in factory work. As a general rule the employer himself is not in a position to know whether the home worker's children or any other children, or, in fact, any other persons, are contributing labor to the production of any individual home worker. The home worker herself has little incentive to control child labor, since she commonly works against a deadline the meeting of which is essential if she is to continue to get work from the employer. Anxious, as she is, to keep the work and to finish [fol. 104] it in time, it is difficult for Federal or State inspectors to obtain exact information from her as to assist-

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[187] R. 264-334; see also Price, 703-704.

[188] R. 264-265.

[189] Sec. 12, Fair Labor Standards Act.

[190] R. 272-273. Of 18 firms employing home workers found to be violating the child labor provisions of the Act, seven each were engaged in crochet beading and hand embroidery, and in lace cutting, and two each in Schiffli and hand-machine embroidery, and passementerie work (Administrator's Exhibit 9, p. 41; Appendix, table 3, p. 49).

ance received by her from other persons.[191] Miss Price stated that child labor violations are usually found only after extensive investigation of home workers in their homes.[192] Miss McConnell expressed the opinion that the problem of enforcement of the child labor provisions of the Act in home work is unique and presents special problems which are clearly not present in the enforcement of the provisions in the factory. The problem is an almost insurmountable one not only for law enforcement agencies but for employers and home workers themselves.[193]

The difficulties in ascertaining the wages paid to home workers are reflected in the records maintained by employers. Such records must be kept in accordance with regulations of the Wage and Hour Division.[194] It was found in the first days of its administration that the operation of the Fair Labor Standards Act tended to lead to an increased use of home work and in his first report to Congress, covering the period from August 15 to December 31, 1938, former Administrator Elmer Andrews stated:

> The primary difficulty is to get an accurate record of the hours worked by employees working on material in their homes. Employers under the Act and under the regulations of this Division have the responsibility for keeping accurate records of hours worked each day and each week, and no difficulties present themselves in the keeping of these records for employees employed in factories. For the home worker, however, [fol. 105] it is an entirely different story—the employer has no direct method of determining the number of hours worked by a particular home worker or a family of home workers on a lot of goods because they do not perform their work under his immediate supervision.[195]

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[191] Price, R. 700.

[192] R. 703.

[193] R. 329-334. See also Cheesman, R. 129; Beyer, R. 169.

[194] Title 29, c. V, Part 516, Code of Federal Regulations. See particularly Section 516.11. Administrator's Exhibit 10.

[195] Interim Report of the Administrator of the Wage and Hour Division, p. IV-4; see International Ladies' Garment Workers' Union Exhibit 5, page 25.

In January 1939, a hearing was held by the Administrator to consider special record-keeping requirements for employers of industrial home workers. As a result of the hearing, a system of dual records was established. The employer is required to maintain records which include information concerning the identity of the home worker, the time worked and piece rates paid with respect to each week of employment. The identity of agents, distributors, and contractors must also be indicated in the records. In addition to keeping these records, each employer of home workers must obtain from the Wage and Hour Division handbooks providing spaces for similar information. A handbook is required to be supplied by the employer to each home worker, and the information required therein must be entered by the employer or the person distributing home work on behalf of such employer each time work is given out or received from the home worker. Except for the time necessary for the making of such entries by the employer, the handbook must remain in the possession of the home worker.[196] These special record-keeping regulations for [fol. 106] home workers went into effect in the spring of 1939.

The evidence in this proceeding conclusively shows that there have been consistent and widespread violations of the record-keeping regulations by employers in this Industry.[197] The report of the Economics Branch contained in an analysis of the results of home work inspections of 222 firms in the Embroideries Industry made, with relatively few exceptions, between May 1, 1941 and May 1,

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[196] Administrator's Exhibit 10; Administrator's Exhibit 11, copy of Wage and Hour Division Form CI-33, Record of Industrial Home Work Handbooks Issued; Administrator's Exhibit 12, Wage and Hour Division, Form CI-34, Acknowledgment of Receipt of Industrial Home Work Handbooks; Administrator's Exhibit 13, Home Worker's Handbook.

[197] Administrator's Exhibit 9, pp. 36-41; tables 17 and 18, pp. 37 and 38; Weiss, R. 20, 21, 583-584; Cheesman, R. 126, 127; Dahl, R. 354, 358, 364; Price, 698-700, 743-747, 756, 759; Lande, R. 1669; Beyer, R. 163; McConnell, R. 278, 279; Ackroyd, R. 107; Nachman, R. 421, 423; Administrator's Exhibits 19a and 19b.

1942.[198] These firms employed 4,369 home workers during the peak season preceding inspection. Compliance with all of the Act's provisions was found in the case of only 3 per cent of the inspected firms.[199] Inadequate, inaccurate, or no records at all were found in the case of 95 per cent of the 222 inspected firms; 211 firms were found to be violating the record-keeping requirements of the Act and the regulations of the Wage and Hour Division.

More than 90 per cent of the firms were found to be in violation of the handbook regulations; 46 per cent had not used handbooks at all prior to the date of inspection.[200] Approximately 40 per cent of the handbooks used were found to be inadequate or inaccurate in important respects; [fol. 107] in the case of 4 per cent of the firms in violation of record-keeping provisions, handbook records were maintained but the handbooks were not in the workers' possession. The most frequent violation was failure to keep proper records of the home workers' hours, "a most fundamental requisite in determining compliance." The report of the Economics Branch stated:

> • • • In some cases, the absence of hours records was due to the difficulty or impossibility of securing an accurate estimate of hours from the home workers. In some cases, it was found that these violations were deliberate. Inspectors found evidence in a number of cases that the home work records of hours worked were manipulated for the purpose of concealing minimum wage and overtime violations. This was particularly true when the hours reported for home workers

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[198] Administrator's Exhibit 9, p. 35. All but 17 of the 222 firms were inspected subsequent to January 27, 1941, the effective date of the present wage order for the industry.

[199] Administrator's Exhibit 9, pp. 35, 36; table 17, p. 37.

[200] Administrator's Exhibit 9, p. 39. Interviews by representatives of the Wage and Hour Division with 1,131 home workers employed by the inspected firms showed that at least 50 per cent were not using handbooks. Of this group 60 per cent were employed in New York by New York firms.

were arrived at by dividing the earnings by the prevailing minimum wage [201]

[fol. 108] Substantial violations of the record-keeping provisions characterized each of the major types of embroidery homework—hand embroidery, crochet beading, Schiffli and hand-machine embroidery, passementerie, lace-cutting and laces and embroideries other than Schiffli or hand-machine. [202]

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[201] Administrator's Exhibit 9, p. 39. Falsification of hours worked was frequently found to conceal assistance by members of the family or friends. In such cases it was impossible to determine the actual number of hours worked by either the home worker of record or those who were assisting her. The report of the Economics Branch stated (Administrator's Exhibit 9, pp. 39 and 41):

> In numerous cases as shown by inspection reports, no records of any kind were maintained. One distributor, for example, paid a total of $5,700 in wages to home workers in one year, and yet there was no record of the names, production, hours of work, earnings or other facts which should have been evidenced by pay roll data. Another distributor had no records of any kind, including those for cash receipts and disbursements; of course, no time records, nor any records of the quantity of work given out or piece rates paid were available. In another case, the only guidance was the gross dollar volume obtained by the distributor from the manufacturer who set the rate on the work contracted. The gross dollar volume was broken down by periods of the effective minima, after allocating deductions of overhead and profit for the distributor, in order to arrive at a rough determination of the wages paid and the restitution due.
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> Some employers kept records for only part of their home workers. Others kept records for only a part of the period of employment.

[202] Administrator's Exhibit 9, p. 39; tables 17 and 19, pp. 37 and 40. See Price, R. 698-699. Miss Price testified she had inspected 22 embroidery firms in New York City since May 15, 1941, and found that all of the firms were in viola-

Violations of the record-keeping requirements of the Act and the regulations of the Wage and Hour Division were shown even in the testimony of home workers who appeared at the hearings on behalf of employers opposed to the restriction or prohibition of home work.

Three of the home workers had no handbooks.[203] Mrs. Mildred Maretzo's handbook[204] showed that in weeks ending October 12, 1942, and October 19, 1942, she worked 47 and 49½ hours respectively but received no overtime compensation for the hours per week above 40.[205] No information was available in the handbook on hours worked per week, wages earned at regular piece rates, overtime [fol. 109] earned, deductions for Social Security tax and other purposes, net wages paid or average hourly earnings.[206]

Mrs. Florence Acerbo's handbook showed that for one week in August 1942, she worked 48 hours and received payment of 92 cents for overtime.[207]

A handbook issued by the Elite Embroidery Works of New York City to Mrs. Angelina Fugaro was not dated nor signed by the home worker; nor did it indicate, as required, the name and address of the person actually giving

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tion of one or more provisions of the Act. Inadequate records were found in the case of every firm investigated. One-third kept no records whatever for home workers, and two-thirds did not use handbooks required by the Division. See also Cheesman, R. 134. Mr. Cheesman testified a review of 78 case files dealing with embroideries establishments employing home workers showed 60 had been found to be in violation of the record-keeping regulations. Lande, R. 1667, 1668.

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[203] Mrs. Mamie Gangemi, R. 846; Mrs. Margaret Boarman, R. 1425; Mrs. Johanah Ethel Johnson, R. 1428, 1435.

[204] International Ladies' Garment Workers' Union Exhibit 4.

[205] R. 982.

[206] International Ladies' Garment Workers' Union Exhibit 4.

[207] International Ladies' Garment Workers' Union Exhibit 3.

out the work.[208] Workweek data were not supplied. Average hourly earnings were not indicated. A second handbook issued to Mrs. Fugaro was not singed by her nor were average hourly earnings shown.[209] The handbook contained no entries for the day, month and hour on which Mrs. Fugaro received lots of home work from the company between March 26, 1942, and October 3, 1942, except in three instances. In many cases the time when work was returned could only be inferred from other entries. Amounts deducted for Social Security Tax and other purposes, net amounts paid to Mrs. Fugaro and the times when payments to her were made were not shown.[210]

It is apparent that exact data on the hourly earnings of home workers are virtually impossible to obtain without actual home investigations of each home worker. It is also apparent that data obtained from records maintained by employees or from home worker interviews tend to overstate home workers' hourly earnings, rather than to underestimate them. In order to obtain the most accurate data possible for the purpose of this proceeding, the Eco- [fol. 110] nomics Branch consulted inspection reports of the Wage and Hour Division for 173 firms which were inspected between January 27, 1941, when the present 37½-cents-per-hour wage order minimum became effective, and July 1, 1942.[211] The survey covered 832 home workers.

The report explained:

> • • • These reports are based on interviews with representative home workers by inspectors of the Wage and Hour Division during the course of their investigation to determine whether or not the Act is being violated. The estimates of hours worked and hourly earnings are made, as a rule, on the basis of the workers' records or recollection of the time consumed in completing the work on which she was most recently

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[208] Pleaters, Stitchers and Embroiderers Association Exhibit 6.

[209] Pleaters, Stichers and Embroiderers Association Exhibit 7.

[210] See also Administrator's Exhibits 19(a) and 19(b).

[211] Administrator's Exhibit 9, table 15, p. 33.

> engaged. In some instances the estimates of time worked and hourly earnings were checked by the inspector through the use of time studies.
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> There can be little question that earnings data based on this type of investigation cannot be scientifically accurate. To the extent, however, that they represent approximations of the earning capabilities of a representative group of home workers, they do throw considerable light on the compliance problem involved in applying the Act to home workers * * *[212]

The Economics Branch found that even during the boom period from January 27, 1941 to July 1942, 61.2 percent of the home workers in the Industry as a whole were paid less than 37½ cents an hour, in violation of the applicable minimum wage order. It was found that 52.6 percent of the home workers received less than 35 cents [fol. 111] an hour; nearly 30 percent less than 25 cents; and 17.4 percent less than 20 cents. Fifteen home workers, or 1.8 percent of the total number, were paid as little as 10 cents an hour or less.[213] The percentage receiving less than 37½ cents an hour was highest, 90.2 percent, in lace cutting and lowest, 23.3 percent, in crochet beading. Miscellaneous embroidery had 81.3 percent of the home workers receiving less than the wage order minimum, passementerie, 74.1 percent, hand embroidery, 72.6 percent, and Schiffli and Swiss hand-machine embroidery, 31.1 percent.[214]

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[212] Administrator's Exhibit 9, p. 32. Most of the inspections were made during the course of a routine inspection drive in the Industry.

[213] Administrator's Exhibit 9, table 15, p. 33. Eight home workers engaged in hand embroidery, four in passementerie, two in lace cutting and one in miscellaneous embroidery were paid less than 10 cents an hour, according to the Wage and Hour Division's inspection reports.

[214] Administrator's Exhibit 9, table 15, p. 33. Distributors had the highest percentages of home workers receiving less than 37½ cents an hour, namely, 81.2 percent, but manufacturers and contractors, with 45.8 and 57.4 percent, respectively, also had very substantial numbers of home workers in this category. The percentage of home workers found in complaint cases to be receiving less than the wage order minimum wage was 71.1 as compared with 54.8 in noncomplaint cases. *Id.*, table 16, p. 34.

Miss Kate Papert, Director, Division of Women in Industry and Minimum Wage, New York Department of Labor, testified that routine visits by inspectors of the Home Work Bureau of the Division in the years 1941 and 1942 to 1,582 home workers in New York, of whom 633 worked on embroidery, showed that half of those engaged in hand rolling received less than 15 cents an hour, while those doing lace cutting and thread pulling averaged only 20 cents an hour. About 65 percent of the home workers engaged in straight embroidery work, about 62 percent of those working on trimmings, pipings and passementerie, about 86 percent in lace cutting and thread pulling, about 57 percent in embroidery design and about 50 percent in appliqueing and fagoting were paid less than 37½ cents [fol. 112] an hour. Twenty percent of the home workers engaged in crochet beading were paid less than 37½ cents an hour.[215]

The evidence in the record, including the report of the Economics Branch, which showed low subminimum earnings for the bulk of the home workers in this Industry, was not seriously contested at the hearing. Five New York City embroidery associations offered testimony of individual employers and individual home workers which endeavored to show that the hourly wages of the home workers employed by members of the association were above the applicable minimum.[216] This testimony was confined to wages

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[215] R. 1480-1482; New York Department of Labor Exhibits 8, 9 and 10. The figures cited are estimates based upon the assumption that half of the home workers receiving between 35 and 40 cents an hour were paid less than 37½ cents an hour. The percentages of home workers engaged in the various types of embroidery paid less than 35 and 40 cents an hour, respectively, were: for all embroidery home workers, 46.6 and 58.7; in straight embroidery, 56.2 and 73.2; in pipings, trimmings and passementerie work, 58.8 and 65.8; in lace cutting and thread pulling, 81.3 and 90.6; in embroidery design, 54.4 and 61.4; in appliqueing and fagoting, 45.8 and 54.2; in crochet beading, 14.9 and 23.7. All of the home workers engaged in hand rolling were paid less than 37½ cents an hour.

[216] Friedensohn, R. 994, 995, 1031, 1032; Alpine, R. 1256; Meyerson, R. 1196; Geller, R. 1237; Orloff, R. 1094; Stern,

paid to home workers engaged in crochet beading and hand embroidery including veil dotting and bullion embroidery on military and naval insignia devices for officers.

The employers contended that the piece rates established for crochet beading would yield on the average between 50 and 75 cents per hour, while the piece rates for hand em- [fol. 113] broideries would yield between 40 and 60 cents an hour. These figures were admittedly estimates based upon the amount of time required, in the judgment of the employers, for completion of different lots of work, as calculated by their timing of sample makers in the factories. No testimony was presented by the employers with respect to the earnings of veil dotters in the homes, with the exception of the negotiations leading to a consent decree issued in June 1942. In the case of home workers doing bullion embroidery for military and naval insignia, the only evidence in support of the contention that a high rate is earned was a statement to that effect by a manufacturer who produced such embroidery together with other types of hand embroidery.[217]

The testimony of the home workers on cross-examination revealed that they were under a serious misapprehension as to the hourly earnings which they received at the piece rates established by their employers. Mrs. Mary Franks, a witness for the Pleaters, Stitchers and Embroiders Association, Inc., of New York City, for example, stated that her hourly earnings on the operation of crochet beading were between 60 and 70 cents an hour.[218] Examination of her handbook, however, showed that, assuming its accuracy without a time study, her average hourly earnings were 30 cents lower than her estimate in some weeks during the

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R. 1262; Franks, R. 783; Gagliardi, R. 821, 822; Gangemi, R. 834; Locascio, R. 861; Pelino, R. 881; Acerbo, R. 943; Maretzo, R. 976; Fugaro, R. 1183; LaGalente, R. 1278; Comenzo, R. 1300; Panzeca, R. 1316; Pillischer, R. 1330; White, R. 1397; Boarman, R. 1420; Johnson, R. 1427.

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[217] Friedensohn, R. 1032; Orloff, R. 112-113; Meyerson, R. 1197, 1203, 1212-1213; Geller, R. 1239, 1241; Landau, R. 905-920, 1672-1684; Sprung, R. 1443-1446.

[218] R. 784-785, 790.

period September to November 1942.[219] Similar discrepancies were shown in the testimony of Mrs. Jean Pelino,[220] and Mrs. Angelina Fugaro.[221]

[fol. 114] In the absence of time studies, it is not possible to determine the accuracy of the handbooks or the testimony offered with respect to the earnings of individual home workers. Statements of home workers engaged in crochet beading who were interviewed by inspectors of the New York regional office of the Wage and Hour Division in October 1942 that their earnings generally exceeded the minimum[222] must be considered in the light of this fact. I must also take into account the fact, which is abundantly proved in the record, that the home workers who testified at the hearing were selected by the parties to the proceeding.[223] Furthermore, the evidence shows that they were typically persons who had long experience in the Industry.[224] It is apparent that under any piece-rate system

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[219] International Ladies' Garment Workers' Union Exhibit 2.

[220] R. 881, 889, 897; see also R. 887-888, 901-902.

[221] R. 1173-1174, 1189-1190.

[222] Price, R. 707-708. Of the 66 home workers questioned, 25 did not have handbooks with them against which their statements could be checked. Miss Price testified "No effort was made to substantiate either the handbook record or the employees' statements." Three of the home workers interviewed reported they received 30 cents an hour.

[223] Franks, R. 797-800, 805; Gangemi, R. 851-853, 857; Pelino, R. 903-904; Acerbo, R. 954-955, 967; Maretzo, R. 987-991; Pillischer, R. 1330-1331; White, R. 1399; Johnson, R. 1430.

[224] Mrs. Florence Acerbo testified that she had had about 15 to 20 years' experience as a crochet beader (R. 962) and that she thought her time on the various lots of work must be the same as that of the sample makers "because when they give me that amount of work I usually take the same she does" (R. 963). Mrs. Mildred Maretzo had also done work as a crochet beader for about 15 years (R. 977) and thought that it usually took her less time to do the work than the time set for each piece by the employer on the basis of the sample maker's work (R. 978). See also Fugaro,

certain workers of high productivity will earn the minimum and more. This does not in any way disprove the fact that workers of lesser productivity may not earn the mini- [fol. 115] mum. Indeed, the very workers who appeared in behalf of their employers stated that other home workers were not as skilled.[225] Accordingly, I have determined that greater weight must be given to the statistical studies of the Economics Branch of the Wage and Hour Division and of the New York State Department of Labor, than to the statements of the home workers and home work employers.

Additional information supplied by the Economics Branch showed that of 22 firms employing home workers in New York, Pennsylvania, and Illinois in the operations of crochet beading and hand embroidery 11, or 50 percent, violated the applicable minimum wage provisions of the Act and the present wage order. Ten firms, or 45 percent, violated the minimum wage order. An additional 12 firms, which were primarily engaged in crochet beading, were analyzed, and it was found that five, or 41 percent, had violated minimum wage requirements of the Act or wage order during this period and four, or 33⅓ percent, had violated the minimum wage order.[226]

Analysis of inspected firms according to average hourly earnings by principal operations performed by the home worker during the period January 27, 1941 to July 1, 1942, showed that 72.6 percent of the home workers principally doing hand embroidering, which includes bullion embroidery, were paid less than 37½ cents an hour and 26.5 percent during this period received less than 20 cents an hour. In miscellaneous embroidery operations, which include veil dotting, 81.3 percent of the home workers received less than the minimum and 37.5 percent received less than 30 cents an hour. Of the home workers engaged principally in

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R. 1184; LaGalante, R. 1276, 1289-1290; Comenzo, R. 1299-1300, 1301-1302; Panzeca, R. 1315-1317, 1322-1324; White, R. 1397, 1399, 1400-1403; Boarman, R. 1419; Johnson, R. 1426.

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[225] Locascio, R. 867; Gagliardi, R. 821-822, 825; Gangemi, R. 834-835, 853.

[226] Administrator's Exhibit 18.

[fol. 116] crochet beading, 23.3 percent received less than the applicable minimum.[227]

The study of the New York State Department of Labor confirms this picture of substantial violation of the minimum wage in the Industry as a whole, and in its various branches.[228]

Assuming that I could accept the contention that piece rates for certain operations in this Industry are high enough to yield the minimum, there does not seem to be any basis for concluding that an administratively feasible distinction can be made which would permit the continuation of home work with respect to those operations. It is apparent that any order regulating, restricting, or prohibiting home work would have to be administered with respect to the persons engaged as employers and employees in the Industry. The facts in the record show that in many cases the individual home worker may be engaged in different types of operations. Even if there is specialization during particular seasons, the employee performs different types of work during the year. Similarly, the employer handles different types of embroidery except in unusual cases.[229]

The evidence does not demonstrate that there is sufficient distinction between employees on the basis of operations performed to warrant administration on this basis, even if otherwise justified. In this connection, it may be noted that the wage report of the Economics Branch was made on the basis of classification of home workers by *principal* operations, although the home workers were commonly engaged in other operations as well.

[fol. 117] In view of the competitive relationship between different types of embroidery, any regulatory, restrictive, or prohibitory order affecting only certain operations would create a competitive disadvantage for the employers engaged in those operations. These employers would be forced to meet the strict controls enforceable in the case of

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[227] Administrator's Exhibit 9, table 15, p. 33.

[228] New York Department of Labor Exhibit 10.

[229] Administrator's Exhibit 9, p. 13; Friedensohn, R. 992, 1060-1063, 1086; Meyerson, R. 1221-1223; Geller, R. 1235; Alpine, R. 1248-1250; Ganz, R. 1268; Sprung, R. 1458, 1461-1463.

factory employment, whereas their competitors would be able to resort to the evasive practices characteristic of unrestricted home work. To cover part of the Industry with a prohibition of home work, while permitting home work in other parts would also permit evasion of the prohibition in that part of the Industry to which the prohibition applied.[230] I conclude that the evidence in the record does not support the separate treatment of different embroidery operations, as a matter of administrative feasibility, insofar as the regulation, restriction, or prohibition of home work in the Industry is concerned.

C. *Regulation of Industrial Home Work in the Embroideries Industry*

The long course of experience with industrial home work has demonstrated its detrimental effect on labor standards and has shown that labor conditions in home work cannot be controlled.[231] Many efforts have been made to correct this situation. After unsuccessful union and legislative efforts to bring home work under control in the nineteenth century,[232] 12 States passed legislation during the eighteen [fol. 118] nineties designed to restrict and regulate tenement workshops.[233] Effective enforcement was impossible, however, and home work remained a serious problem.[234] Although sweatshops were wiped out by legislation[235] and home work was limited by unions through collective bargaining agreements providing for abolition,[236] the agree-

[230] See the testimony of Mrs. Clara M. Beyer, Assistant Director, Division of Labor Standards, United States Department of Labor, R. 169-171.

[231] Beyer, R. 182, 183; Ackroyd, R. 87-94; Papert, R. 1478-1488; Division of Labor Standards Exhibits 2, 8, 17, 20, 21, 25; International Ladies' Garment Workers' Union Exhibit 5.

[232] Division of Labor Standards Exhibit 21, pp. 11-15.

[233] Division of Labor Standards Exhibit 4, p. 3; International Ladies' Garment Workers' Union Exhibit 5, p. 9.

[234] Division of Labor Standards Exhibit 21, p. 18.

[235] *Id.*, pp. 18-20, inclusive.

[236] International Ladies' Garment Workers' Union Exhibit 5, p. 10.

ments were limited in scope and anti-sweating laws proved totally inadequate where home work was concerned.[237]

A subsequent period of legislative regulation by a few States aimed directly at home work and an extension of anti-sweating laws achieved little effective control prior to 1930.[238] Labor unions faced with the problem of safeguarding wage standards succeeded in including provisions in collective bargaining agreements for the abolition of home work.[239]

Years of depression during the thirties gave rise to increased home work and renewed attempts to control it. Control of home work was sought in new State laws providing for abolition by administrative order,[240] and these laws became the only effective statutory approach to a problem generally considered beyond regulation.[241]

[fol. 119] During the same period of depression, action was taken by the National Recovery Administration to restrict home work under codes issued pursuant to the National Industrial Recovery Act.[242] The general purpose of this Act was to establish codes of fair competition by administrative order raising labor standards and preventing unfair trade practices. Minimum wages and maximum hours were established industry by industry. Industrial home work was not mentioned specifically in the Act. Nevertheless, 118 of the 556 codes included home work provisions.[243] Eighty-six percent of the 118 prohibited home

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[237] Division of Labor Standards Exhibit 21, pp. 18-20.

[238] Division of Labor Standards Exhibit 21, p. 25; International Ladies' Garment Workers' Union Exhibit 5, pp. 19-23 and Appendix.

[239] International Ladies' Garment Workers' Union Exhibit 5, pp. 11, 12; Division of Labor Standards Exhibit 21, pp. 25-27.

[240] Division of Labor Standards Exhibit 21, p. 35.

[241] *Id.*, pp. 36-40.

[242] Act of June, 1933, c. 90, 49 Stat. 195; Division of Labor Standards Exhibit 4, pp. 6, 7; Division of Labor Standards Exhibit 21, pp. 28-31; International Ladies' Garment Workers' Union Exhibit 5, pp. 23-33.

[243] Division of Labor Standards Exhibit 21, pp. 28 and 29.

work; the balance merely attempted regulation. In spite of none too effective enforcement, home work was greatly reduced. Its volume turned sharply upward, however, when the National Industrial Recovery Act was declared unconstitutional.[244]

This review of the documents and exhibits in the record summarizing the various attempts to control home work in general prior to the Fair Labor Standards Act leads to the conclusion that labor conditions in industrial home work are not susceptible to regulation. Industrial home work occupies in the Embroideries Industry as important and characteristic a place as in any apparel or related industry and was a major factor contributing to the fact that prior to the Fair Labor Standards Act its history was one of exceptionally low wages, long hours and unsatisfactory [fol. 120] working conditions.[245] In 1933, many employers and employers' associations, as well as Federal and State agencies, welfare organizations and labor unions appealed to the National Recovery Administration to restrict home work in codes applicable to the Embroideries Industry in order to provide better means of achieving the stabilization of wages, working conditions, trade practices and prices which were the objectives of the codes.[246] Prohibition or limitation of industrial home work was provided for in codes for four branches of the Industry: Schiffli Hand-Machine Embroidery and Thread and Scallop Cutting; Pleating, Stitching and Bonnaz and Hand Embroidery; Art Needlework; and Slit Fabric Manufacturing.[247] The decision of the United States Supreme Court

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[244] *Schechter Corp.* v. *United States*, 295 U. S. 495 (1935); International Ladies' Garment Workers' Union Exhibit 5, p. 34.

[245] Beyer, R. 150; Papert, R. 1479, 1480; Friedensohn, R. 993, 994; Orloff, R. 1097; Weinberg, R. 1582-1584; Division of Labor Standards Exhibits 1-8; International Ladies' Garment Workers' Union Exhibits 6-9.

[246] Beyer, R. 147, 148, 150; Friedensohn, R. 993, 994; Division of Labor Standards Exhibits 1-5; International Ladies' Garment Workers' Union Exhibit 6, pp. 1, 5, 7, 8.

[247] Beyer, R. 159; Friedensohn, R. 993; Division of Labor Standards Exhibit 9; Division of Labor Standards Exhibit 4, p. 43.

in the *Schechter* case,[248] declaring the National Industrial Recovery Act unconstitutional, was followed by general deterioration of wage standards, and home work again became widespread in the Industry.[249]

[fol. 121] Eight States have in recent years enacted legislation prohibiting home work generally or in specific in-

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[248] 295 U. S. 495 (1935).

[249] In 1937 inspectors of the Home Work Bureau of the New York Department of Labor interviewed 1,800 workers performing embroidery work of all kinds in the home. Hourly earnings at that time ranged from 9 cents per hour for embroidery on infants' apparel to 17 cents per hour for trimmings (Papert, R. 1479, 1480).

Abraham Friedensohn, Public Art Embroidery, Inc., New York, New York, testified before Industry Committee No. 15 for the Embroideries Industry on September 4, 1940, that "it is impossible to control the hand embroidery situation because the work is being done at home" and that this was "a statement we can all take for granted because the situation exists" (R. 1037). He testified further that: "In 1933 when the N. R. A. was established, and our industry is on record that we have all made an honest effort to eliminate the evils of the so-called bedroom shops * * * we maintained at that time that if we would eliminate homework and would set up a minimum wage for the workers in our places that would uplift industry and it would give us manufacturers a chance for a better livelihood. * * * It would also eliminate those very (I have no word for those evils) evils that are beyond human imagery. * * * At the time when the code was drawn up for our industry—we were included originally—we pleaded that homework be eliminated. * * * Another part of the industry walked up at the same time and they said that if homework would be eliminated they would be deprived of their livelihood and their wages. * * * They considered their protest at that time. A hearing was held by the administrator of the N. R. A. and until the N. R. A. was abolished homework was never abolished. * * * However, at the time when we had the idea that homework would be abolished the workers began to get better pay; * * * but the minute the N. R. A. was abolished and homework continued as freely as before the same thing went on all over again. * * *

dustries, including the Embroideries Industry, or have delegated authority to State administrative agencies to issue [fol. 122] regulatory or prohibitory orders.[250] Variations in local standards have, however, resulted in a confused situation in the Industry, evasive practices, including the shifting of home work from States that have attempted to

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Whatever we did then in an effort to raise the workers' wages during the time that we had contemplated the end of homework was forgotten. You can readily see this, anyone who has knowledge about the time it takes to make an average piece of embroidery the way it is sold in the stores today. It is sold for such ridiculously low prices that I sometimes wonder how any human being can have the heart to employ people for such low wages as to produce embroidery for such prices." See R. 1073-1074. Since essential relationships between manufacturers and contractors are not, despite Mr. Friedensohn's statement to the contrary (R. 1037), basically any different at the present time than they were in September 1940 (*supra*, pp. 56-63), the views expressed by him before Industry Committee No. 15 would also appear to be applicable to the effects of home work on conditions in the Industry including minimum wages, at the present time.

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[250] The State of Connecticut prohibits any distribution of home work. Oregon's prohibition extends to all manufacturing industries. In California home work has been restricted in the Garment Manufacturing Industry to workers unable to adjust to factory work because of age, physical or mental disability, or whose services are needed to care for an invalid in the home. Rhode Island has by administrative order prohibited home work in the Wearing Apparel and Allied Industries. New York has similarly prohibited or restricted home work in four industries—Men's and Boys' Clothing, Men's and Boys' Neckwear, Artificial Flowers and Feather, and Gloves. New York has also prohibited distribution of home work by other than genuine contractors and manufacturers. New Jersey has restricted the number and employment of home workers. Beyer, R. 166, 167; Ackroyd, R. 88, 89; Papert, R. 1486, 1499; New York Department of Labor Exhibit 12; Division of Labor Standards Exhibits 10 and 11.

regulate or prohibit it to other States, in which it is permitted, competitive inequalities and consequent continued depression of wage standards. It is the nearly unanimous viewpoint of Federal and State officials having experience in the administration of labor laws, that since home work is a Nation-wide problem, regulation, restriction or prohibition of industrial home work must be on a Nation-wide basis if minimum wage standards are to be preserved and upheld.[251]

Experience under the Fair Labor Standards Act of 1938 has also indicated that labor conditions in industrial home work in this Industry are not susceptible to regulation that will guarantee that the home worker will be paid the established minimum rate. Home workers engaged in the production of goods for commerce are required to be paid the established minimum rates. The Economics Branch of the [fol. 123] Wage and Hour Division presented the results of home work inspections of 222 firms in the Embroideries Industry, which reported the employment of 4,369 home workers during the peak season preceding the inspection. With few exceptions, the inspections were made between May 1, 1941 and May 1, 1942, when a special home work inspection drive in the Embroideries Industry was conducted.[252] Compliance with the Act has been the exception rather than the rule.[253]

In the first instance, full and accurate records are a basic factor in securing effective enforcement. The evidence in the record on the extent of compliance with the record-keeping regulations of the Wage and Hour Division [254] was sumarized in an earlier section of this opinion.[255] It shows

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[251] Cheesman, R. 681; Beyer, R. 166-168; Papert, R. 1488; Ackroyd, R. 93, 94; Division of Labor Standards Exhibit 25.

[252] Administrator's Exhibit 9, pp. 35-45. The entire period covered by the inspections studied was January 27, 1941 to July 1, 1942. More than 63 per cent of the cases involving approximately 48 per cent of the home workers were non-compliant inspections *id.*, p. 35.

[253] *Ibid.*

[254] Title 29, c. V, Part 516, Code of Federal Regulations.

[255] *Supra*, pp. 72-78.

that inedaqute, inaccurate, or no records at all were maintained by 211 of the 222 firms with respect to their home workers, that more than 90 percent of the firms violated the handbook regulations, that 46 percent had not used handbooks at all prior to inspection, that 40 percent of the handbooks used were inadequate or inaccurate, and that violations of the record-keeping regulations were found in the case of every major type of embroidery performed in the homes.[256] Violations of the record-keeping regulations were [fol. 124] clearly shown in the testimony of home workers who appeared at the hearing.[257]

Sixty percent of the firms were found not to be in compliance with the minimum wages required by the Act.[258] Among these firms were 70 percent of those whose home workers performed principally hand embroidery and crochet beading, 68 percent of the firms whose home workers did passementerie, 30 percent of the concerns whose home workers engaged in Schiffli and hand-machine embroidery and all the lace-cutting firms.[259] Forty-three per-

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[256] Administrator's Exhibit 9, p. 39; tables 17 and 19, pp. 37 and 40. Price, R. 698-699; Cheesman, R. 134; Lande, R. 1667-1668.

[257] Four of the home workers, Mrs. Mamie Gangemi, Mrs. Frances Gagliardi, Mrs. Margaret Boarman, and Mrs. Johanah Ethel Johnson had no handbooks (R. 830, 854, 1428, 1432, 1433). See the testimony of Mrs. Mildred Maretzo, R. 982, International Ladies' Garment Workers' Union Exhibit 4, and the handbooks of Mrs. Angelina Fugaro (Pleaters, Stitchers and Embroiderers Association Exhibits 6 and 7).

[258] Administrator's Exhibit 9, p. 41; table 17, p. 37. See also Price, R. 699-701; Cheesman, R. 125, 126, 134; Dahl, R. 352-355; Ackroyd, R. 92; Beyer, R. 161-163; Papert, R. 1480-1438; New York State Department of Labor Exhibit 10.

[259] Administrator's Exhibit 9, p. 41. Reports on the earnings of home workers visited in 1941 and 1942 by inspectors of the Bureau of Homework Inspection, New York State Department of Labor, showed that the median average hourly earnings were 33.5 cents for hand embroidery, 44.2 cents for crochet beading, 32.6 cents for trimmings, piping and passementerie, 20.0 cents for lace cutting and thread

cent of the manufacturers, 58 percent of the contractors and 81 percent of the distributors were in violation of the minimum wage provisions.[260]

A factor of considerable importance in determining whether home workers are paid the minimum is the common practice of requiring home workers to pick up and return [fol. 125] the work allotted to them. This ordinarily involves several hours of travel time each week for the home worker, members of her family, or friends.[261] When travel to the factory is required by the employer and occurs regularly, the time consumed therein is regarded as hours worked and must be taken into account in determining whether the minimum rate or rates prescribed by the Act or an applicable wage order are being paid.[262] Generally, however, time so spent is not taken into account by the employer in fixing the piece rates.[263]

A further tendency toward violation of minimum wage requirements grows out of the casual manner in which home work is carried on.[264] There are obvious causes or inducements for the home worker to obtain and receive assistance from members of her family and other persons. Such assistance is frequently hidden from the employer and can be ascertained only by visits to the home workers' homes.[265]

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pulling, 34.3 cents for embroidery design, 37.5 cents for applique and fagotting, 14.7 cents for hand rolling, and 36.5 cents for miscellaneous operations. (New York State Department of Labor Exhibit 10.)

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[260] Administrator's Exhibit 9, p. 41.

[261] Price, R. 702-708; Acerbo, R. 953, 954, 964; Fugaro, R. 1182; LaGalente, R. 1285-1288, 1295-1296; Panzeca, R. 1320-1321; White, R. 1416; Boarman, R. 1423.

[262] If more than one trip per day is made to the factory, however, only one trip is regarded as hours worked which must be paid for in compliance with the Act.

[263] Price, R. 702, 708; Boarman, R. 1422.

[264] Administrator's Exhibit 9, p. 31; Price, R. 703; McConnell, R. 276-277; Cheesman, R. 126-127; Dahl, R. 479-480; LaGalente, R. 1285; Comenzo, R. 1301; Gangemi, R. 846, 851.

[265] Price, R. 703; McConnell, R. 276-277.

Thus, the very factors which make home work seem attractive to the home workers, namely, the absence of factory discipline, the fact that the work can be done on the worker's own time, and in a casual way, and that she is enabled to attend at the same time to her household responsibilities [fol. 126] while supplementing the family income,[266] preclude any possibility of reasonable assurance that even home workers who, on the basis of the piece rates paid, seem to be earning the minimum wages prescribed by the Act are in any given case actually receiving the minimum.

The inspectors of the Wage and Hour Division who testified at the hearing emphasized the almost insuperable task of discovering minimum wage and other violations in home work in the Industry and of estimating back wages due the home workers where records are inaccurate or inadequate. Home work inspections require five to twenty times the number of days required for factory inspections. Due to employer and home worker forgetfulness and lack of cooperativeness, together with the characteristic absence of adequate records, the problem of calculating restriction in home work cases has been difficult.[267] Violations are found not only in the case of first inspections of individual concerns but also in second and third inspections. Such inspections are costly and generally unproductive of satisfactory results whether from the point of view of securing compliance with the Act on the part of employers or from the point of view of obtaining restitution for home workers for unpaid minimum wages and overtime.[268] Even when constant contact is maintained by the Division with employers of home workers, violations of the Act are persistent. The willingness of employers to comply by no means assures compliance since the conditions under which home work is performed are largely outside their control.[269]

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[266] Acerbo, R. 943, 951-952, 956, 964, 967-968; Maretzo, R. 976, 977; Fugaro, R. 1172-1174; LaGalente, R. 1277-1279; Comenzo, R. 1300, 1301, 1302, 1303; Panzeca, R. 1315-1317, 1321, 1324-1327; White, R. 1398; Boarman, R. 1418-1419; Johnson, R. 1425-1427.

[267] Cheesman, R. 126-133.

[268] Dahl, R. 352-354, 357-358.

[269] R. 705.

[fol. 127] I conclude, upon the entire record, that industrial home work in the various branches of the Embroideries Industry furnishes a ready means of circumventing or evading the minimum wage order for this Industry and that there has been wholesale violation of the record-keeping and minimum wage requirements of the Act and regulations issued thereunder.

Considerable testimony was introduced on the question of the accuracy of determining wages and hours of work on the basis of piece rates established by time testing the sample maker in the factory. The evidence shows that piece rates cannot practically be set so as to reflect accurately the hours of work of the home worker or secure reliably a definite hourly wage. Home work conditions are not subject to control or standardization as are those in the factory. Employers have no supervision or control over the home worker's hours of work.[270] The home workers themselves vary greatly in skill, productivity, and efficiency.[271] Styles and operations also vary greatly.[272]

Nathan Weinberg, Associate Economist, International Ladies' Garment Workers' Union, testified:

> Almost invariably when the question of restricting home work comes up it is suggested that the problem might be solved through the fixing of piece rates. But [fol. 128] this proposal has to be considered in the light of the fact that the Fair Labor Standards Act provides not for the payment of an average wage but for the payment of a minimum wage and at best an idea- system of piece rate fixing will approximate an average wage. That is, you can fix a piece rate with the idea in mind that you want the piece rate to yield the workers

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[270] Administrator's Exhibit 9, pp. 28-31; Ackroyd, R. 92, 113; Beyer, R. 165; Dahl, R. 458-460, 474-475; Weiss, R. 26, 456; Price, R. 743, 744, 747-749; Papert, R. 1536; Weinberg, R. 1600-1606, 1616-1617; Nachman, R. 439-441, Friedensohn, R. 1020-1036; Orloff, R. 1112-1120, 1155-1159, 1169.

[271] Administrator's Exhibit 9, pp. 28, 29; Beyer, R. 165, 166; Cheesman, R. 127; Weinberg, R. 1600; Nachman, R. 439; Orloff, R. 1132-1153.

[272] Administrator's Exhibit 9, p. 28; Beyer, R. 165; Weiss, R. 25, 26; Price, R. 737; Papert, R. 1542; Orloff, R. 1137-1145.

who work on that piece rate 90 cents an hour. If you have been able to work out the piece rate properly, the average worker will earn 90 cents an hour, but there is no way of knowing what the slowest worker will make. In statistical terms the minimum wage would be at the lower or left-hand of a distribution, while the average would be the measure of central tendency in that distribution. The average would vary from the minimum in accordance with what statisticians call dispersion. In wage distribution, dispersion is a result of a number of factors. One of these is plain and simple human variability. The second is the method by which work is performed, whether or not all workers engaged in the work use the same motions, the same tools, and the third thing is the conditions under which the work is performed, the light, the seating arrangements, the work table, the ventilation and so on. In a factory, on the whole, conditions are standardized within that factory. Lighting is the same all over the factory, the chairs generally are uniform, the tables are uniform, and so on. And frequently in a factory, I believe, where industrial engineers are employed, the methods of performing the work are also standardized. That is, the engineer will watch a group of workers, analyze their motions to determine which motions yield the most rapid performance of a particular operation and then train all workers the use of those particular motions in performing a specific operation. Yet even in [fol. 129] a factory where conditions are standardized and where methods are standardized, it has been found that the third factor, human variability, results in ratios of productivity range as high in one case as 5.1 to 1.[273]

Jack M. Orloff, President of the Pleaters, Stitchers and Embroideries Association, Inc., of New York City, proposed, in addition to the elimination of contractors in home work,[274] that regulations be issued providing that no home

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[273] R. 1600-1601.

[274] The significance of contractors and distributors in determining the conditions under which industrial home work in the industry is carried on is discussed in another section of this opinion (*supra*, pp. 56-63).

workers may be given in one week more than 40 times the amount of work which the sample maker can produce in one hour as determined by a time-study. Mr. Orloff proposed that it be required that at least one factory worker be employed on every type of work done by a home worker so that a basis would exist for comparing the effect of established piece rates in both the factory and the home. He also urged that the home work handbooks be revised and simplified.[275] The essential difficulty in attempting to apply factory piece rates, whether determined on the basis of the sample maker's work or in any other manner, to home workers, is however, that conditions in the factory are not comparable with those in home work.[276] Mere changes in record-keeping requirements would not eliminate the prac- [fol. 130] tices which have resulted in undermining minimum wage standards.[277] Upon the basis of the facts dis-

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[275] R. 1099.

[276] Administrator's Exhibit 9, p. 28; Weiss, R. 546-548, 551-552, 592-595, 652-654; Cheesman, R. 125-127, 132-133, 685-689, 692-695; Dahl, R. 458-460, 474-475; Price, R. 737, 747-749; Lande, R. 1664-1666; Friedensohn, R. 1403-1405; Orloff, R. 1002-1005, 1114-1117; Acerbo, R. 949-950; Pelino, R. 888-892; White, R. 1184-1189; Weinberg, R. 1602-1603.

[277] Ranges in productivity of workers in factories are restricted by standardization and control of operations. Close supervision of the piece rates is possible. Their adjustment is constant and relatively simple, based upon the observed effects of their operation. Detailed records of productivity and hours enable ready determination of whether a worker has earned the minimum. Even under factory conditions, however, variations from the established norms are considerable. In home work, on the other hand, there is no way of knowing whether the piece rates fixed on the basis of the sample maker's work under factory conditions bear any relationship whatever to a rate which will guarantee the home workers the minimum wage. Adequate records are not available. The conditions of work vary widely. The absence of records makes impossible any exact calculations of the amounts of make up that must often be paid to large numbers of home workers by virtue of their failure to produce in accordance with the established standards. Weinberg, R. 1602-1603.

closed by the record, it would be necessary, in order to arrive at piece rates that would guarantee the minimum wage, either to adopt the alternative of setting the rates at levels which will guarantee the minimum to the home worker of least productivity, which is impossible from a business [fol. 131] standpoint,[278] or to adopt the equally impossible alternative from an administrative standpoint of setting individual rates for each home worker in each of the numerous operations in the manufacture of embroidery to which she might be assigned.

Few home work operations in the Embroideries Industry are definite or standardized.[279] Barnett W. Landau, Executive Director, Veil Dotters' Association of America, Inc., New York, New York, alleged that upon the basis of time tests of home workers employed as veil dotters by members of his association, it was determined that a piece rate of

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[278] Conceivably a sufficiently high piece rate could be fixed so that the average home worker on any given operation would be paid the minimum. Such a piece rate would, however, have to be so high that few, if any employers could afford to pay it. If the range in productivity between the fastest and slowest workers were as much as 5.1 to 1, the same piece rate that would yield the slowest worker the minimum rate of 40 cents per hour would give the fastest worker $2.00 per hour. See International Ladies' Garment Workers' Union Exhibits 11 (a), (b), and (c).

Under Section 6(a)(4), every employee on the mainland, unless otherwise exempt, must receive the applicable minimum *hourly* rate. Section 6(a)(5) of the Act permits payment of piece rates in Puerto Rico and the Virgin Islands which are "commensurate" with applicable minimum hourly rates and authorizes the Administrator to establish standards for piece rates including the proportion or class of employees who shall receive not less than the minimum hourly rate. It is only pursuant to this section of the Act that the limited class of employees in Puerto Rico and the Virgin Islands may be legally paid on a basis which does not yield the applicable hourly minimum to all employees subject to the Act.

[279] Menders of Schiffli and hand-machine embroidery are customarily paid an hourly wage rather than on a piece rate basis. Administrator's Exhibit 9, p. 29.

three cents per hundred dots would be sufficient to assure the home workers the present minimum wage of 37½ cents an hour.[280] This rate was recognized for enforcement purposes by the New York Regional Office, Wage and Hour Division, as the basis for a consent decree agreed to by members of the association in June 1942. Inspection difficulties in home work to which reference has already been made frequently compel such compromises in enforcing the Act's provisions in home work. The very nature of home work precludes the possibility of obtaining for the individual home worker minimum wages to which she is entitled under the Act and which can readily be guaranteed to the worker in the factory. It is clear, moreover, that since the rate in this case was constructed for the worker of average skill, it could not guarantee all home workers the minimum wage.[281] Of thirty home workers time-tested by the associ-

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[280] R. 905, 906.

[281] Lande, R. 1666; See Price, R. 698-700.

[282] Mr. Landau testified that 90 to 95 percent of all veil dotting is done in New York City, with Chicago, Illinois, St. Louis, Missouri, and Los Angeles, California, accounting for the remainder. He stated that 26 firms were engaged in veil dotting in New York City, and that the 21 firms which were members of his association had a peak employment of from 1,000 to 1,500 home workers (R. 905-906, 915-918). Miss Anne Lande, Acting Supervising Inspector, New York Regional Office, Wage and Hour Division, testified, however, that the consent decrees entered in June 1942 against ten members of the association had been found on inspection in January and February 1942, to employ 112 home workers. One additional firm not a member of the association, which was also covered by the decree, employed 16 home workers. The other ten members of the association had, in January and February 1942, gone out of business (R. 1662-1664). One firm was found to be in compliance. In addition, the report of the Economics Branch showed that 17 concerns engaged in veil dotting received handbooks between April 1, 1939 and July 15, 1942. Only 185 home workers were engaged principally in miscellaneous embroidery operations, which as classified included veil dotting, in firms inspected between June 1, 1939 and July 1, 1942

[fol. 132] ation, [282] some actually received, at three cents per hundred dots, as little as 30 and 33 cents per hour.[283]

The piece rate fixed for veil dotting, considered in the light of the factors affecting home work earnings which are disclosed by the record, does not, in my judgment, afford a reasonable basis for believing that home workers can be guaranteed the minimum wages to which they are entitled by means of governmentally established piece rates. Even in veil dotting, the frequent lack of adequate working space [fol. 133] in the homes,[284] differences in productive ability, lack of employer supervision, participation by other persons in pick up and delivery of the work and in the actual performance of the work, and the intermittent character of home work preclude the possibility of drawing any conclusion from the evidence presented that piece rates can be satisfactorily established which will assure home workers the minimum. The multiplicity of styles and operations in other branches gives overwhelming support to this conclusion insofar as the Industry as a whole is concerned.

The record shows that piece rates have never been properly established to assure home workers the required minimum wage. Abraham Friedensohn, Public Art Embroidery, Inc., New York City, an employer witness on behalf of

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(Administrator's Exhibit 9, tables 8 and 9, pp. 14 and 15). The difference in the figures of home work employment in veil dotting given by Mr. Laudau and those indicated by the inspections of the New York Regional Office and by the Economics Branch report may be due to the fact that veil dotting is carried on, not only by embroidery contractors, but also by contractors who are regarded by the Division as being included in the Millinery and Women's Apparel Industries (Landau, R. 919). Upon the basis of all the evidence in the record on this matter, it would seem clear that the latter figures more closely approximate the actual number of home workers engaged in veil dotting in the Embroideries Industry than do the figures given by Mr. Laudau.

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[283] Lande, R. 1665.

[284] Jack Orloff, Orloff Sons, Inc., testified that the amount of working space per worker engaged in crochet beading in the factory is about 35 square feet (R. 1097).

the Pleaters, Stitchers and Embroiderers Association, Inc., testified on cross-examination that the entries made by employers in the home workers' handbooks did not reflect the actual amounts of time worked by the home workers on the various lots of work but were the amounts of time "allotted by the firm in accordance with its own test."[285] Mr. Friedensohn stated that the employer's estimate based upon the work of the sample makers "is the only gauge [fol. 134] that we have to guide ourselves by."[286] His testimony indicated that the same standard also governs the determination of whether the home worker is entitled to overtime, being based on whether the amount of work given to her during the week was estimated to require more than 40 hours of work by the home worker, not upon whether the home worker, in fact, worked more than 40 hours,[287] and that the employer had no way of knowing without actual visits to each home worker how many hours are actually worked, whether the home worker receives assistance from any other persons, or whether children perform any of the work.[288] This, Mr. Friedensohn indicated, was particu-

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[285] R. 1021. Mr. Friedensohn's contention that if the time allotted by the employer is not sufficient, the home workers will complain and may cease working for the employer (R. 1021-1022) is not borne out by the testimony of the home workers who stated that they were not asked upon delivery of the various lots of work how much working time each lot had required and that they themselves kept no record of the length of time required but assumed that the time fixed by the employer was correct. See, for example, the testimony of Mrs. Florence Acerbo, R. 849-950. Mrs. Jean Pelino, R. 888-892, and Mrs. Angelina Fugaro, R. 1184-1189; Friedensohn, R. 1002-1005, Mrs. Florence White, R. 1400, 1401, 1403-1405.

[286] R. 1024.

[287] R. 1024-1025, 1026.

[288] R. 1026-1028. Mr. Friedensohn described the sample maker whose work is the foundation of the piece rates as "a more accurate worker" rather than a better than average worker (R. 1030-1034, 1056). Mr. Friedensohn testified further that the sample hands themselves average between 62½ and 75 cents an hour on crochet beading and 50 cents an hour on hand embroidery (R. 1034-1036). Mr. Frieden-

larly true in situations where a contractor intervenes between the embroidery manufacturer and the home worker.[289]

Jack Orloff, Orloff Sons, Inc., New York, New York, another employer witness for the Pleaters, Stitchers and Embroiderers Association, Inc., described the method of determining piece rates in his establishment as follows:

> [fol. 135] * * * the particular article would be timed by an average worker * * * so that the workers—the work that is given at home is figured at a fair figure to the worker * * * and the workers that do that work at home are average workers in my opinion.[290]

He testified further, in answer to questions:

> Q. But the actual entry made [in the handbook] is not based upon the actual time it took her but only the estimated time assuming that she is an average worker, is that correct?
>
> A. That is correct.
>
> Q. And when any time is entered in the home worker's handbook for overtime, does that reflect the actual overtime spent by that worker in her home?
>
> A. Well, it would be——
>
> Q. Or is it also estimated?
>
> A. It is estimated; it would be estimated.
>
> Q. And not the actual time?
>
> A. And not the actual time.[291]

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sohn's testimony indicated that the work done by his firm required skilled workers (R. 1031). Approximately 35 per cent of the work done by this firm in 1942 was in crochet beading while 15 per cent was in hand embroidery including bullion embroidery on naval officer insignia (R. 1055-1056, 1060).

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[289] R. 1039. The effect of the New York statute and the New Jersey Industrial Home Work Law (Division of Labor Standards Exhibit 11) is discussed *supra*, pp. 56-63.

[290] R. 1112.

[291] R. 1113. See also R. 1122-1123, 1157, 1158. Mr. Orloff testified that his crochet beading sample workers averaged between 50 and 60 cents an hour, depending upon the type

Mr. Orloff's testimony made clear that the wages paid are the same whether the home worker called for and delivered the work or it is sent to and brought back from her by other employees.[292] He claimed that when the home worker complained that the time set for a particular item was too [fol. 136] short considering the piece rate, adjustments would be made by paying additional amounts to the home worker, but that generally the home workers did the work in less time than that estimated on the basis of the sample maker.[293] The testimony of the home workers indicates, however, that the practice of making payments above the piece rates to slower workers is probably restricted to a very few firms in the Industry since the home workers themselves do not keep any close check on the time they work and are, in fact, unable to do so.[294]

There is evidence in the record[295] and administrative experience has shown that fear of loss of employment induces many home workers to refrain from reporting time worked on a particular piece of work in excess of the time which the employer indicates should be required.

Perry Meyerson, Treasurer, Meyerson Bros., Inc., New York, New York, another employer witness who appeared on behalf of the Pleaters, Stitchers and Embroiderers Asso-

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of work done, while his hand embroidery sample makers averaged between 40 and 50 cents an hour. One hand-sewing sample maker averaged 45 cents an hour. This latter worker was paid $20 per week, whereas two years ago she was paid $18 per week, although her rate per hour for time testing purposes had not been changed. R. 1116-1118.

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[292] R. 1120.

[293] R. 1157. See n. 285, supra. The employers contend that the sample maker is slower than the average home worker in order to assure a more perfect sample. Allowance is usually made for this extra time, however, in fixing the piece rates for the extra time expended by the sample maker.

[294] Acerbo, R. 949-950; Pelino, R. 882-892; Fugaro, R. 1184-1189.

[295] See Price, R. 700, 742-746.

ciation, Inc., testifying with respect to the fixing of piece rates,[296] explained the method used as follows:

> • • • we try to work out inside, we have a piece made by one of our inside workers. We determine from that how long it takes to make and when a homeworker comes in we give her that work and tell her that that work should be produced in a certain stipulated time [fol. 137] and when she gets it she is advised that after making the first piece if she cannot make it not to go ahead with the lot.[297]

If the work were returned and—

> we found that we could pay more for that work she would get paid more or it would be taken away from her and someone else would make it perhaps due to the fact that it is some kind of intricate design which she could not follow so fast. There are certain designs —one girl, for instance, in embroidery can turn out a piece in an hour and the next girl would take an hour and a half for the identical, the same piece of work.[298]

It appeared, however, that despite the differences in the nature of the work and in the degree of skill possessed by the home workers work was seldom, if ever, returned.[299]

An effort was made by one of the firms which appeared for the associations opposed to the restriction or prohibition of home work to have the handbooks show the actual amount of time worked by the home workers on each lot.[300] It was contended that the home workers of this concern were questioned each time work was returned by them as to the amounts of time they had spent on it, that when they did not complete the work in the required amount of time and would be compelled to work a longer period of time on the particular lot,[301] make up would be paid if the

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[296] The same piece rates were paid to home workers as to inside workers (R. 1196).

[297] R. 1197.

[298] R. 1204.

[299] *Ibid.*

[300] See the testimony of Miss Jessie Geller, M. C. M. Pleating Company, New York, New York (R. 1234-1238, 1239).

[301] R. 1239-1240.

[fol. 138] time taken reduced the wage per hour below the minimum for the Industry.[302] Mrs. Jean Pelino, a hand embroidery home worker employed by the firm, testified that she averaged approximately 40 cents an hour.[303] She said that she was told when each lot of work was given out the amount of time it should require, based upon the sample maker's time.[304] Mrs. Pelino called for and delivered work three or four times a week, each trip averaging between three and four hours depending on the length of waiting time at the firm's office. Even assuming that she sometimes shopped while traveling to and from the firm's factory, it is probable that Mrs. Pelino's wages estimated o the basis of the total number of hours for which she should have been paid, were actually considerably below the applicable minimum of 37½ cents an hour.[305]

Further evidencing the fact that wages paid on a piece rate basis cannot be relied upon to assure home workers the applicable minimum *hourly* wage, Mrs. Pelino testified as follows:

> Q. Assuming that you are given * * * a bundle of work which consists of 12 dozen and each dozen is paid 40 cents, so the total amount to be paid for [fol. 139] that work would be 40 times 12——
>
> A. (Interposing:) Right.
>
> Q. $4.08, [sic] is that correct?
>
> A. Yes.
>
> Q. Will you get any more for that bundle whether you have worked on it the day before and put in twelve hours or only if you put in eight hours?

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[302] R. 1247.

[303] R. 881.

[304] R. 888-889.

[305] R. 883-884, 901. See also Price, R. 702-703. Mrs. Pelino's earnings ranged, according to her testimony, between 40 cents an hour and 60 cents an hour "when I work real fast" (R. 881). Her handbook showed earnings of $3.46 for 9 hours' work, or 38.44 cents per hour, and $2.38 for six hours' work, or 39.67 cents per hour in two weeks in April and July, 1942 (R. 887-888). Her weekly earnings were considerably higher in other weeks but her hours for such weeks were not stated. Mrs. Pelino's handbook was not submitted in evidence (R. 901).

A. No, I wouldn't get any more.

Q. In other words, as long as you bring that work——

A. (Interposing:) You could make it in three hours, as long as you can make it, they don't care how long you take.

Q. And if it takes 16 hours work, other days before, you will get paid by the piece and not for the time it took you, is that correct?

A. Yes.[306]

Mrs. Pelino stated that she did not keep any written record of the amount of time she spent on a particular lot of work, because the time was recorded by her employer in her handbook.[307] Although she always reported to the company the time she had spent—

> they know the time • • • I tell them my time, and it is about the same time as theirs • • • I remember how long I took, and I tell them when I go back how long it took me to make the work • • • I don't keep any records.[308]

It seems worthwhile to quote at length from the testimony of this witness on the practices followed by the firm when [fol. 140] the hourly earnings as determined upon the basis of the piece rates paid, fell below the legal minimum. In answer to questions by Counsel for the International Ladies' Garment Workers' Union, Mrs. Pelino testified:

Q. • • • assume that a piece of work was given to you and the estimated time by the firm is two hours——

A. Yes.

Q. The price for that work would be set at 75 cents.

A. That is right.

Q. Now, we will assume that it took you instead of two hours, two and a half hours to do that piece of work, could you make 37½ cents on that particular piece of work?

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[306] R. 891-892. The figure $4.08 should, upon the basis of the question asked, have been given as $4.80. The error was apparently one of transcription.

[307] R. 895, 902-903.

[308] R. 896-897; see also, in this connection, Weiss, R. 29.

A. No, on that I couldn't, but other work is better paid than that; so it makes up.

Q. It may average up?

A. That is right.

Q. But on that particular work, you couldn't make the 37½ cents an hour?

A. No.

Q. If you had reported that to the firm, that you cannot make the 37½ cents an hour quota or could such an occasion happen?

A. Yes, I did.

Q. Did they increase the price on that particular piece of work to you?

A. They did.

Q. They did?

A. Yes.

Q. And they have readjusted all the work that you have done on that garment?

A. Yes.

Q. So that when you said that the average of the price, then according to you, you didn't have to average up the price to get better work because they improved the price on that garment, is that correct?

A. That is right.

Q. Now, which one is correct, will they average the price or improve the price on that garment?

A. Well, sometimes the garments do take a little longer than others, and they raised the price a little way.

[fol. 141] Q. And on some garments they just let the price stand and they expect you to make it up with a better paying garment?

A. Yes.[309]

It is clear from Mrs. Pelino's testimony that even when the handbook entries are based on reports by the home workers and the piece rates paid taken together with the amount of working time shown to be spent per week indicate on the surface compliance with the minimum wages required by the Act, it is impossible to be certain that any home worker, particularly one who is paid wages at or

[309] R. 898-899.

near the minimum rate, is actually receiving the minimum. Although some employers have made determined efforts to fix piece rates designed to guarantee the minimum wage prescribed by the Act or applicable wage order, such efforts cannot be relied upon to accomplish their objective.

The problem which confronts the Wage and Hour Division in enforcing a minimum wage order for the Embroideries Industry with respect to home work is not alone the opportunities which home work affords to unscrupulous employers for evading the minimum wages required by the wage order or the unfair competitive advantages which they gain thereby, although the testimony of Wage and Hour Division inspectors indicates that situations of this kind are frequently encountered, but difficulties inherent in the uncontrolled nature of home work which make it impossible for well-intentioned employers as well as Government inspectors to obtain accurate knowledge as to how home workers spend their time, under what conditions they work and what assistance they obtain from other persons.[310] These various factors make clear that piece rates [fol. 142] which are determined on the basis of work performed under factory conditions cannot be relied upon to assure home workers the minimum wage prescribed for the Industry unless they are fixed at such a high level as to be unusable from a business point of view.

I conclude that mere regulation of industrial home work, including regulation of the record-keeping practices of employers or governmental establishment of piece rates will not be adequate to secure effective enforcement of the minimum wage order for the Embroideries Industry.

D. *Effect of Home Work on Minimum Wage Standards*

It was testified at the hearing that home work is cheaper in terms of labor costs than factory work and is used by employers to reduce production costs,[311] despite the advantages derived from the direct supervision over production, standardization and specialization which are possible in the factory. The evidence adduced at the hearing conclusively shows that large proportions of home work em-

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[310] Cheesman, R. 126-133; Dahl, R. 352-356, 357-358; Price, R. 705; see also Beyer, R. 165-166.

[311] Papert, R. 1509-1510, 1535-1536; Weinberg, R. 1579.

ployees in the Embroideries Industry and in all of its branches are paid less than the applicable minimum.[312] It is apparent that if some employers are allowed to utilize home workers at subminimum wage scales, other employers compelled to pay a 40-cent minimum will be placed at a competitive disadvantage.

Representatives of the Pleaters, Stitchers and Embroiderers Association, Philadelphia, Pennsylvania,[313] appeared [fol. 143] at the hearing and requested that home work be abolished in the Embroideries Industry for the following reasons:

> First, the difficulty of controlling hours and wages of the home workers; second, as a result of this lack of control, unfair competition, at least in the Philadelphia market, has arisen between the contractors of these home workers and the machine embroiderers, I mean those that do embroidery by machine in the factories * * * We * * * are of the opinion that since we service the dress manufacturing industry almost exclusively and since they have an order which will substantially abolish home work as of December 1, we feel as a matter of uniformity that the order by the Administrator should be the same.[314]

It was contended, however, by the associations and employers opposed to the restriction or prohibition of home work that home work should not be prohibited in crochet beading, hand embroidery, or bullion embroidery of military and naval insignia devices for officers since, allegedly, these operations are peformed exclusively by home workers, and factory standards cannot, therefore, be endangered by the continuance of home work in these fields.[315]

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[312] *Supra*, pp. 78-85.

[313] This association at the time of the hearing had 26 members employing 300 to 350 workers, and representing 90 percent of the embroidery firms in Philadelphia exclusive of those which employed home workers (R. 376).

[314] R. 369.

[315] See the brief filed in this proceeding by the Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York, p. 6; Allan, R. 1660. See, however, Orloff, R.

The record does not support the premise on which this argument is founded, namely, that the operations in question are performed only by home workers. According to data compiled by the Economics Branch, 61 of the 102 firms whose home workers were found in inspections conducted [fol. 144] between June 1, 1939 and July 1, 1942, to be primarily engaged in crochet beading and hand embroidery had inside shops.[316] Of these 61 firms, 39, or 64.0 percent had crochet beading and hand embroidery performed as a method of production by both inside and plant workers, while only 19, or 31.1 percent, employed no inside workers on this type of work.[317] In interviews with 149 home workers who were principally engaged in crochet beading in establishments with inside shops, 127, or 85.2 percent, reported that crochet beading was also performed as a method of production by plant workers in such establishments, and only 11, or 7.4 percent, indicated that they were employed by firms which had no plant workers performing crochet beading as a method of production.[318] Of the 249 home workers primarily engaged in hand embroidery other than crochet beading, 137, or 55.1 percent, stated that hand embroidery was also performed by plant workers in the establishments for which they worked, while only 89, or

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1115-1116, 1576; Friedensohn, R. 994, 1006, 1026, 1069; Meyerson, R. 1202; Ganz, R. 1268; Geller, R. 1235; Alpine, R. 1252; Stern, R. 1261-1262; Sprung, R. 1443, 1456-1464, 1467-1468.

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[316] Administrator's Exhibit 9, table 11, p. 18. Forty-one plants, or 40.2 percent of the total had no inside plants.

[317] Administrator's Exhibit 9, table 11, p. 18. Whether the work was done in the plant as well as in the home workers' homes was not reported for 3, or 4.9 percent, of the firms. The term "method of production" does not encompass non-recurring operations such as are performed by sample makers. *Id.* p. 19.

[318] Administrator's Exhibit 9, table 12, p. 19. Whether crochet beading was performed in both the plant and in the home workers' homes was not reported in the case of 11, or 7.4 percent of the home workers.

35.7 percent, were employed by plants that had no plant workers performing this work as a method of production.[319] The testimony of home work employers who opposed the re- [fol. 145] striction or prohibition of home work also indicated that both inside and home workers were employed on crochet beading, hand embroidery, and bullion embroidery of military and naval insignia devices for officers.[320]

As shown by data compiled by the Economics Branch from inspection records of the Wage and Hour Division, 94.0 percent of the firms whose home workers were principally engaged in Schiffli and Swiss hand-machine embroidery had inside shops; 39.7 percent of these plants had such embroidery work done by both inside and home workers, while 55.5 percent had it done only by home workers. Coresponding percentages with respect to home workers primarily engaged in passementerie, lace cutting and miscellaneous embroidery operations were, respectively: 80.0, 45.0, and 55.0; 44.4, 75.0, and 25.0; and 60.0, 50.0, and 50.0. More than 71 percent of all of the firms inspected had inside shops. Operations performed by home workers were likewise performed by plant workers in 51.9 percent of the firms, while 44.3 percent of the firms had

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[319] Administrator's Exhibit 9, table 12, p. 19. Reports on whether hand embroidery other than crochet beading was done in both the plant and the home workers' homes were not obtained from 23, or 9.2 percent, of the home workers.

[320] The Vanguard Military Equipment Corporation was engaged exclusively in bullion embroidery and employed 19 factory and 32 home workers to perform this work. Sprung, R. 1443, 1456-1464, 1467-1468. The Worth Pleating Company of New York City up to 1940 and for seven years prior thereto employed 20 factory workers on hand embroidery and crochet beading. Alpine, R. 1252. Oscar Stern, Inc., also of New York City, employed 20 inside workers on hand embroidery and crochet beading in 1941 and 12 inside workers on these operations in 1942. Stern, R. 1262. Public Art Embroidery, New York City, during the 1942 season employed about 30 home workers on hand embroidery and crochet beading and 12 factory workers on crochet beading. Friedensohn, R. 1025, 1070.

these operations performed only by home workers.[321] Of the 226 home workers interviewed who were primarily engaged in Schiffli and Swiss hand-machine embroidery in establishments operating inside shops, 31.0 percent were [fol. 146] employed by concerns which had this work done in both inside shops and home workers' homes, while 64.6 percent were employed by firms which had this work done by home workers exclusively. For home workers principally engaged in passementerie, lace cutting and miscellaneous embroidery operations the corresponding percentages were, respectively: 47.5 and 50.5; 86.5 and 13.5; and 68.7 and 31.3.[322]

There are undoubtedly instances in which operations performed by home workers are not identical with operations performed in the factory. This does not eliminate competition between the products manufactured by the factory worker and the home worker since the very operations performed by the home worker may determine consumer preference and cause diversion of employment from the factory.

It is my finding, after due consideration of the low wage rates paid home workers and the competitive relationships among various types of the embroidery operations that it is necessary to provide terms and conditions with respect to the restriction of home work to carry out the purposes of the minimum wage order for the Industry, to prevent the circumvention or evasion thereof and to safeguard the 40-cent hourly minimum established therein.

In my Findings and Opinion in the Matter of Industrial Home Work in the Women's Apparel Industry I directed attention to the relationship between the Women's Apparel Industry and other industries. I pointed out that in

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[321] Administrator's Exhibit 9, table 11, p. 18.

[322] *Id.*, table 12, p. 19. According to the data compiled by the Economics Branch, 158 of the 222 firms in the Industry inspected between June 1, 1939 and July 1, 1942, had inside shops. At the time of inspection 2,406 home workers and 2,651 plant workers were employed by the 222 firms. The total peak season home work employment in these firms was 4,369. *Id.*, tables 5, 10 and 11, pp. 8, 17 and 18, respectively.

[fol. 147] making a finding for that Industry similar to the finding I have made for the Embroideries Industry——

> full recognition is had of the fact that there may be home work employers in other industries whose activities affect the carrying out of the purposes of the 40 cent minimum wage order for the Women's Apparel Industry. The order issued pursuant to this opinion endeavors to meet the problem in the Women's Apparel Industry; other orders will be issued where necessary in other industries.[323]

The Embroideries Industry is one of the industries to which reference was made.

The report of the Economics Branch called attention to this matter. It stated:

> When embroideries are produced by manufacturers of a garment, fabric or other article for use on such garment, fabric or other article, the employees, (including the home workers directly engaged by such manufacturers) are not covered by the embroideries industry definition. If, by way of illustration, a manufacturer of handkerchiefs or of infants' and children's outerwear performs embroidery on his own products, the embroidery work done by his employees is not covered by the embroideries industry definition but instead by the handkerchief or infants' and children's outerwear industry definition. If the embroidery, however, on these same articles is performed by a contractor of embroideries, the production is included under the embroideries industry definition. Thus, a substantial number of embroidery workers, and industrial home [fol. 148] workers in particular, are removed from the coverage of the embroideries industry wage order. The data in this report apply solely to home workers covered by the embroideries industry definition.
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> A considerable amount of embroidery has usually been done in the knitted outerwear and the women's apparel industries on knitted outerwear and on apparel

[323] Findings and Opinion of the Administrator in the Matter of Industrial Home Work in the Women's Apparel Industry, July 8, 1942, p. 13.

for infants, children and women. To prevent the circumvention or evasion of the minimum wage orders issued for the knitted outerwear and women's apparel industries, the Administrator has already provided that no home work in those industries shall be done in or about a home except by former home workers who are unable to adjust themselves to factory work because of age or physical or mental disabilities, or because they are required to remain at home to care for invalids. Nevertheless, those knitted outerwear and women's apparel firms which formerly employed home workers will not be precluded by existing regulations from transferring their embroidery operations to embroideries firms employing home workers.[324]

The order issued pursuant to this opinion will eliminate any competitive disadvantage which may have been suffered by knitted outerwear, women's apparel and handkerchief manufacturers who perform embroidery on their own products, and who have been subject to regulations which prohibit industrial home work as such except in certain very limited conditions[325] while embroidery contractors have been subject to no Federal restrictions on employment of [fol. 149] home workers. It will tend, in accordance with the intention expressed in my opinion on industrial home work in the Women's Apparel Industry, to stabilize competitive relationships between concerns in the Embroideries Industry and in the Women's Apparel, Knitted Outerwear and Handkerchief Manufacturing Industries.

II. Possibility of Adjustment to Factory Production and Employment If Home Work Is Prohibited in the Embroideries Industry

The ability of employers and home workers engaged in home work production in the Embroideries Industry to adjust to the prohibition of home work was considered at

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[324] Administrator's Exhibit 9, p. 1. See also Weiss, R. 20-22; Beyer, R. 171.

[325] Title 29, c. V, Parts 617 and 617.100, 605 and 605.00, 628 and 628.100, Code of Federal Regulations.

length at the hearing.[326] Reports on experience with prohibition of home work under the National Industrial Recovery Act and various State laws were presented in evidence. I have considered all the evidence relating to adjustment to the factory system of manufacture and find that this adjustment can reasonably be made without undue hardship upon home workers or home work employers.

After home work was prohibited in the men's neckwear and men's clothing industries by regulations issued under the national Industrial Recovery Act,[327] the Children's Bureau of the United States Department of Labor made studies of the effects of these regulations.[328] Seventy-five firms and 251 families were investigated.[329] Only one firm discontinued the line of goods on which home workers were [fol. 150] employed as a result of the prohibition of home work; only one went out of business; and only one employed home workers under special handicapped workers certificates.[330] The remainder transferred a substantial part of their home workers to the factory. Of the 3,135 persons who worked at home prior to prohibition of home work, 2,588, or 82 percent, were employed in the factory after abolition of home work.[331] Although many firms continued home work in violation of the codes and this factor is not accurately shown by the data,[332] nonetheless the study does accurately reflect the possibilities of transferring home work to the factory.

In the men's clothing industry, 94 percent of the home workers transferred to factory operation, and practically no complaints of violations of the home work prohibition were received.[333] Hand operations were changed to ma-

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[326] Administrator's Exhibit 9, pp. 22-25; Beyer, R. 166, 167, 172, 175, 182-183; Price, R. 705-707; Ackroyd, R. 89-90; Cheesman, R. 133; Cherashore, R. 368-369; Nachman, R. 370-373.

[327] Act of June 16, 1933, c. 90, 48 Stat. 195.

[328] Division of Labor Standards Exhibit 5.

[329] *Id.* at 9.

[330] *Id.* at 11.

[331] *Id.* at 12.

[332] *Id.* at 13.

[333] *Id.* at 15.

chine operations wherever possible, but in many instances it was impossible to eliminate the hand operations. In these instances, the hand operations were broken down into simple repetitive processes. These methods, in addition to increased specialization, quickened production and offset higher labor and overhead costs.[334] In the men's neckwear industry, however, little attempt was made to change the process when brought into the factory.[335]

The survey conducted by the Children's Bureau showed that home workers who shifted to the factory found little trouble in self-adjustment irrespective of age, and output [fol. 151] improved in quantity and quality. Hourly earnings increased as much as 200 percent.[336] Of 505 families interviewed, the members of not more than 73 found employment outside the home impossible. Members of 241 families obtained factory employment. Satisfactory arrangements for home management and care of dependents and small children were possible in all but 22 cases. Of home workers taken into the factory, only 24 terminated their employment—5 because they were needed at home and 19 because they were unable to adjust satisfactorily to factory employment.[337] The report of the Children's Bureau stated that it should have been possible to compensate for loss of home work by other employment in the case of 72 percent of the families in which no home workers were taken into the factory. In only 4 percent of the 505 families did the loss of home work earnings cause the family to apply for relief.[338]

Similar experience has been reported in the administration of laws restricting the employment of industrial home workers in the States of New Jersey, Rhode Island, and New York.

The State of New Jersey in its Industrial Home work Law,[339] which became effective October 26, 1941, prohibited

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[334] Division of Labor Standards Exhibit 5, pp. 14-15.

[335] *Id.* at 16.

[336] *Id.* at 16-21.

[337] *Id.* at 22, 24.

[338] Division of Labor Standards Exhibit 2, pp. 24-25.

[339] Laws of New Jersey, 1941, Chapter 308, July 28, 1941 (Division of Labor Standards Exhibit 11). See n. 154, *supra*, p. 56.

all home work on articles of infants' and children's wearing apparel and, in the case of all other products, limited home workers' employment to not more than one home worker for every three inside workers engaged in similar work. The effect of this law was the automatic elimination of all home work on articles of infants' and children's wearing [fol. 152] apparel. With few exceptions, most of the home work performed on infants' and children's wear was hand embroidery. With respect to other industries, the Economics Branch reported:

> A marked reduction in the number of home workers occurred in all other industries. Some manufacturers who employed only a few home workers discontinued home work rather than pay the $50 license fee; others decided that they did not want to be burdened with state regulations in addition to the federal requirements. Where the home workers exceeded the stipulated rates of one-third the number of plant workers, the number of home workers had to be reduced. Some home work distributors established shops, hired inside workers and continued to use a limited number of home workers. More than half of the plant workers employed by the 38 firms which directly employed home workers performed operations similar to those performed by the home workers.[340]

Roland G. Cheesman, Supervising Inspector of the Newark, New Jersey office, Wage and Hour Division, testified that a survey of 15 firms in the Embroideries Industry in New Jersey showed that the total number of home workers employed by these firms had been reduced from 126 to 29 in order to comply with the New Jersey law and regulations and that in most instances the work formerly performed by home workers was being done in the plant. Only one of the 15 employers contacted claimed that this change in his operations had been a particular hardship to him.[341] The results of the New Jersey law have clearly been a marked reduction in the number of home workers and the [fol. 153] bringing of many home workers into the factory. Both employers and home workers have made the necessary adjustments to its requirements.

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[340] Administrator's Exhibit 9, p. 24.

[341] R. 133-134.

The Rhode Island Department of Labor in 1938 issued a wage order establishing minimum wages for women and minors in the wearing apparel and accessories industry. To effectuate this minimum, the order also provided for prohibition of industrial home work. The order covered "embroidery operations" performed on underwear, handkerchiefs, infants' and children's clothing, women's dresses and gift novelties. Manufacturers in the State experienced no difficulty in bringing home workers into the factories, and the Industry has continued to grow in the State.[342]

The New York Department of Labor concluded after a study of the effects of prohibition of industrial home work in the artificial flower and feather industry pursuant to New York law that adjustments to prohibition of home work can be made.[343]

This was also the conclusion of Mrs. Clara M. Beyer, Assistant Director, Division of Labor Standards, United States Department of Labor.[344]

It has been contended that home workers in the Embroideries Industry are unwilling or unable to take factory employment and that their labor will be lost to the Industry if home work is prohibited at a time when there is a serious shortage of both factory and home workers.[345] State- [fol. 154] ments of home workers as to their unwillingness or inability to work in a factory,[346] and evidence showing

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[342] Ackroyd, R. 89-90, 114, 124-125.

[343] Papert, R. 1487, 1518-1521; New York Department of Labor Exhibit 5.

[344] R. 172-177; see also Hinrichs, R. 47-48.

[345] See the briefs filed on behalf of Manufacturers of Military and Naval Insignia Devices, p. 35; National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pipings and Trimmings, Inc., p. 12; and Pleaters, Stitchers and Embroiderers Association, Inc., pp. 12-14.

[346] Franks, R. 772; Gagliardi, R. 814-815; Gangemi, R. 833-834; Locascio, R. 860; Pelino, R. 880; Maretzo, R. 976; Fugaro, R. 1172-1173; LaGalente, R. 1277; Panzeca, R. 1315; Pillischer, R. 1329-1330. Compare the testimony of Mrs. Florence Acerbo, R. 942, and Mrs. Mary Comenzo, R. 1300.

the efforts of concerns in the Industry to obtain workers [347] were included in the record.

The Economics Branch summarized the responses given by home workers in the course of inspections by the Division to the question whether they would accept factory employment if available. As pointed out, however, in its report, the question—

> relates to a hypothetical situation, the full content of which is not readily understood by the home worker, and does not, of course, give any clear indication of the home workers' possible reactions if home work were not available.[348]

Even in answer to such a hypothetical question, about 23 per cent of the 1,046 home workers interviewed expressed a willingness to accept factory employment, while 52 per cent stated that they would not accept such employment, assigning various reasons such as household duties, necessity of caring for children or invalids, ill health, age, and [fol. 155] personal preference. A large number of the home workers, 25 per cent, did not give a reply to the question.[349]

Variation of the form of question put to the home workers brought different results, as shown by the testimony of

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[347] Friedensohn R. 995-996, 1006-1008; Orloff, R. 1095-1096, 1101-1103; Meyerson, R. 1196, 1198-1199; Geller, R. 1235-1238; Alpine, R. 1249-1251; Stern, R. 1262-1263; Ganz, R. 1269-1270; Pleaters, Stitchers and Embroiderers Association Exhibits 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17.

[348] Administrator' Exhibit 9, p. 16.

[349] *Ibid.* See also table 13, p. 20. Of the 133 home workers who had had previous factory experience, 63, or 47.4 per cent, said they would be willing to accept factory employment, while 60, or 45.1 per cent, said they would not. When these figures and percentages are compared with those for the 608 home workers who had had no previous factory experience, it seems clear that lack of familiarity with factory work is probably a very significant factor in determining the home workers' willingness to accept factory employment. Of those with no previous factory experience, 163, or 26.8 per cent, expressed willingness to take factory employment, while 421, or 69.3 per cent, said they would not.

Miss Branson Price, Inspector, New York Regional Office, Wage and Hour Division.[350] She testified:

> For the past season or two there has been a great vogue for embroideries, and particularly for crochet beading. During the course of inspections in the embroideries industry, employers have maintained that they had great difficulty in obtaining a sufficient number of crochet beaders to meet the demand, and that the vast majority of crochet beaders will not accept factory employment. In order to determine the validity of these claims it was decided by the Homework Unit of the New York Regional Office of the Wage and Hour Division to interview a number of homeworkers in the embroideries industry whose operations were confined to crochet beading. Accordingly, letters were addressed to 250 homeworkers listed in regional case files of firms which inspection revealed had employed crochet beading homeworkers * * *[351]

[fol. 156] Interviews were had with 128 home workers, of whom 88 were at the time engaged in crochet beading.[352] The latter were asked three questions: (1) whether they would accept factory work if a job were available; (2) whether they would accept a factory job if available and if no home work were available; and (3) if they were unwilling to work in a factory, their reasons therefor. Although only 22 answered the first question affirmatively, 57 gave an affirmative reply to the second. Thirty-one said they were unwilling in any case to work in a factory.[353]

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[350] R. 705-707.

[351] R. 706.

[352] *Ibid.* Twenty-three of those interviewed were employed at inside work at the time of the interview, although they had formerly worked at home (R. 708).

[353] R. 707. Eleven of the 31 home workers unwilling to go into a factory gave reasons which would entitle them to certificates permitting them to engage in home work in industries for which prohibitory orders have thus far been issued.

The 88 home workers were currently employed by 29 concerns but had within the past two seasons worked for 18 additional firms.

Miss Price also testified that during the previous year she had questioned 216 home workers in the Embroideries Industry as to whether they would work in a factory; 79 had answered affirmatively and 137 had answered negatively. Following October 7, 1942, she stated, she had changed the form of the question by inquiring whether the home worker would accept factory employment if available and "if there were no homework." Thirty-two of the 50 home workers questioned answered affirmatively, and only 18 replied in the negative.[354]

Miss Price testified further that in the case of nine embroidery firms which she had inspected and which had dis- [fol. 157] continued home work, 156 employees were performing operations formerly done by 241 home workers. Ninety-seven employees were former home workers.[355]

Of the home workers whose testimony purported to show that they would not work in a factory if no home work were available, ten assigned as the reason for their statements that the care of their children would not permit them to take factory work;[356] one had aged parents living with her;[357] one expressed a disinclination to factory work;[358] one stated that she was ill;[359] and one had an invalid husband.[360] Two of the home workers indicated that it was quite possible they would take factory employment if home work were prohibited.[361] In the light of the reasons

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Sixteen supplemented their income from crochet beading home work by performing other work in off seasons, principally hand embroidery. Some were engaged in both hand embroidery and crochet beading in the same workweek during the crochet beading season.

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[354] R. 705-706.

[355] R. 705.

[356] Frank, R. 772; Locascio, R. 860; Pelino, R. 880; Maretzo, R. 976; Fugaro, R. 1172; LaGalante, R. 1278; Panzeca, R. 1315; Boarman, R. 1419; Johnson, R. 1427.

[357] Gagliardi, R. 816.

[358] Gangemi, R. 834.

[359] Pilfischer, R. 1329.

[360] White, R. 1398.

[361] Acerbo, R. 942; Comenzo, R. 1300.

given by the home workers for their asserted inability to accept factory employment and their domestic circumstances, as shown by their testimony, I am unable to accept their testimony as furnishing a sound basis for predicating their actual conduct when faced with actual prohibition of home work. This conclusion is clearly supported by the evidence in the record that adjustments have been made satisfactorily wherever actual abandonment has occurred.[362]

Employers testified at the hearing that they had had difficulty in obtaining a sufficient number of workers ex- [fol. 158] perienced in crochet beading, hand embroidery and military embroidery and that prohibition of home work would make the carrying on of a major portion of their operations virtually impossible. They stated that they were unable to induce their home workers to accept factory employment.[363]

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[362] Hinrichs, R. 48, 55-58; Beyer, R. 172-175.

[363] Friedensohn, R. 995-996; Orloff, R. 1095-1096; Sprung, R. 1443-1446; see also the briefs submitted on behalf of the Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York, pp. 12-16; the National Hand Embroiderers and Novelty Manufacturers Association and Associated Manufacturers of Tubular Pipings and Trimmings, Inc., New York, New York, pp. 4-6; and Manufacturers of Military and Naval Insignia Devices, pp. 35-38. Similar contentions were advanced in letters to me from the Pleaters, Stitchers and Embroiderers Association, Inc., New York, New York, dated October 3, 1942, April 21, 1943, and June 7, 1943.

On May 5, 1943, the Pleaters, Stitchers and Embroidery Manufacturers Association, Inc., of Chicago, Illinois, submitted its brief on the matters at issue in this proceeding. Representatives of this association, namely, Martin Somers, President, and Irwin H. Weiss, Executive Director and Counsel, were present during the first two days of the hearing but were unable to attend the entire hearing. This association advanced arguments in opposition to the prohibition of home work similar to those urged by the other embroidery associations and manufacturers. It contended that its members were already operating under restrictions imposed by orders of the War Production Board and that farther limitations on their ability to serve the dress industry would compel most of them to close their places of

[fol. 159] The evidence shows that the Pleaters, Stitchers and Embroiderers Association, New York, New York, was at the time of the hearing composed of approximately 320 members of whom not more than 70 utilized homeworkers.[364]

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business. It contended further that they were unable to obtain, either through their own efforts or through the union, additional factory workers for hand embroidery or crochet beading; that home workers "are not individuals who can adapt themselves to defense or war work" and that "it is impossible to obtain new workers inasmuch as we cannot assure them of work throughout the year." The association stated that home workers in the Chicago area were earning the minimum prescribed by the Fair Labor Standards Act, and it referred to the difficulties involved in training competent workers for crochet beading and hand embroidery. The association concluded, "If home work were prohibited the inability of our manufacturers to obtain workers during the present labor shortage in Chicago, due to the war production coupled with the length of time it would take to train new workers (if by any stretch of the imagination they could be obtained) would surely compel a majority of our manufacturers to close their doors." Although the brief submitted by the Pleaters, Stitchers and Embroidery Manufacturers Association of Chicago and the letters of the Pleaters, Stitchers and Embroiderers Association, Inc., referred to above, are not strictly regarded parts of the record in this proceeding since the former was filed after the final date for filing briefs (7 F. R. 11029) and the latter were not made a part of the record at the hearing, the contentions which are advanced are similar to those which were urged at the hearing by the embroidery associations and manufacturers who appeared in opposition to the prohibition of home work. I have carefully considered these contentions in the light of the evidence thereon adduced at the hearing, and I find that they are without foundation.

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[364] Orloff, R. 1108-1109. The association sponsored the prohibition of industrial home work in the code for the Pleating, Stitching and Bonnaz and Hand Embroidery Industry, Code No. 276, under the National Industrial Recovery Act. In its contracts with the International

It would appear, therefore, that for the great majority of the members of this association the prohibition of industrial home work cannot have any harmful effects. Assuming that the members of the association who testified at the hearing are representative of all members who employ home workers,[365] it is also clear that there are factors in [fol. 160] their operations which will tend to mitigate any adverse effects of a prohibition of industrial home work. While hand embroidery, including crochet beading, accounts for a substantial part of their business, it is not in most cases a major part thereof.[366] The major part of the work performed by these concerns consists of the same types of machine embroidery that are performed by concerns which do not utilize home workers.[367] Furthermore, since hand embroidery and crochet beading are commonly used to add further embellishment to machine embroidered items,[368] concerns which are now having such hand work done in homes will be strongly impelled to find means of having this work performed in the factory. I find that neither the association as a whole, nor its members who employ home

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Ladies' Garment Workers' Union, the association continued to assert its opposition in principle to industrial home work. It does not appear that any formal action to modify the association's position on the prohibition of home work was adopted until November 12, 1942, 10 days after the commencement of the hearing in this proceeding, when its Board of Directors adopted a resolution expressing interest in the matter. Orloff, R. 1163-1167, 1169; Pleaters, Stitchers and Embroiderers Association Exhibit 21.

[365] It was stipulated that additional employers who were named for the record were "prepared to testify to substantially the same matters as other employers of homeworkers have testified to date at this hearing" and that "on cross examination the answers to questions would elicit the same information and the same answers as have been elicited to this date from employers on cross-examination" (R. 1265-1266).

[366] Friedensohn, R. 1055; Orloff, R. 1100; Meyerson, R. 1195; Geller, R. 1241; Alpine, R. 1261-1265.

[367] Orloff, R. 1094-1095.

[368] See Orloff, R. 1096.

workers, will, in the light of conditions in the Embroideries Industry as disclosed by the record, have any great difficulty in adjusting their operations to the prohibition of industrial home work, nor will they suffer any serious competitive disadvantage therefrom.

The evidence does not show the number of members of the National Hand Embroiderers and Novelty Manufacturers Association or of the Associated Manufacturers of Tubular Pipings and Trimmings, Inc., who utilize home workers.[369] The evidence is particularly vague concerning [fol. 161] the operations conducted by members of the former association.[370] Upon the evidence in the record, I find that the prohibition of industrial home work will not involve for the members of these associations such disruption of their operations as will jeopardize their ability to continue in business or subject them to any significant competitive disadvantage.

It was testified that concerns engaged in bullion embroidery of military and naval insignia devices for officers' uniforms were also engaged in other types of embroidery, including both machine and hand embroidery.[371] The adaptability to changes in operations which characterizes the Embroideries Industry as well as all other apparel industries, can be counted upon to effect whatever adjustments will be required by the prohibition of industrial home work. Since these concerns produce nearly all of the bullion embroidery for military and naval insignia devices,[372] it is clear that they will not be subjected to any competitive disadvantage by the prohibition of industrial home work. I

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[369] Friedman, R. 1342-1350, 1362-1363. The Associated Manufacturers of Tubular Pipings and Trimmings, Inc., had a membership of approximately 35 concerns at the time of the hearing. It appears that this association had, in its contract with Local 66 of the International Ladies' Garment Workers' Union, agreed in principle to the abolition of home work (R. 1362, 1363). The membership of the National Hand Embroidery and Novelty Manufacturers Association was not stated for the record.

[370] See R. 1346-1350.

[371] Sprung, R. 1456-1463.

[372] Sprung, R. 1441, 1442.

find that these concerns will thereby be caused no undue hardship nor any substantial competitive disadvantages.

The evidence which was offered by the embroidery associations and manufacturers opposing the prohibition of home work to show that employers have had difficulty in securing a sufficient number of employees fails to demonstrate that any insuperable obstacles will be encountered by employers in adjusting their operations. Crochet beading, hand embroidery and military embroidery were markedly stimulated in 1942 by orders of the War Production Board which, by limiting the quantity and types of materials available for use in the production of garments, in- [fol. 162] duced dress and other apparel manufacturers to rely more heavily than usual upon crochet beading and hand embroidery for the embellishment of their products, and by the increased requirements of the armed forces for appropriate insignia for officers' uniforms.[373] Firms which formerly performed pleating, tucking and shirring as their major operations have recently undertaken crochet beading, hand embroidery and military embroidery for the first time. The demand for workers experienced in these types of embroidery on both the part of firms newly engaged in this work and concerns which were already producing these types of embroidery was tremendously increased in 1942.[374]

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[373] Style changes have always been a significant factor in the Industry since it is largely integrated with the dress and other apparel industries (Administrator's Exhibit 9, p. 10). Seasonality has also been an important aspect of operations in certain branches. For example, crochet beading is normally at its peak from the latter part of July through October. Some small amounts of crochet beading are done in the early spring. Hand embroidery normally reaches its peak in March. Meyerson, R. 1200-1201, 1217. See also Beyer, R. 177; Price, R. 706; Friedensohn, R. 995-996; Orloff, R. 1095-1096, 1140-1141; Sprung, R. 1443-1446; Weinberg, R. 1612.

[374] Julius Ganz testified that his concern had not done any crochet beading work until about 1940 and that hand work was an innovation for his concern (R. 1273). Abraham Friedensohn and Jack Orloff stated that they were for the first time attempting bullion embroidery of military and naval insignia devices for officers' uniforms although em-

The demand for new workers was not, however, limited to factory workers but applied to home workers as well.[375] An analysis of 651 advertisements for embroidery workers which were published on behalf of 123 firms in a New York City newspaper in the month of August 1942, showed that 312, or nearly half, called for workers to do crochet bead- [fol. 163] ing.[376] Home workers were sought in 77, and factory workers in 91 advertisements for crochet beaders.[377] Home workers were sought in a majority of the advertisements for other types of embroidery workers which specified whether home or factory workers were wanted.[378] In the case of advertisements submitted for the record by the Pleaters, Stitchers and Embroiderers Association, Inc., of New York City, 93 referred exclusively to crochet beading, 10 to hand embroidery, 26 to crochet beading and hand embroidery, 25 to crochet beading and spangling, 7 to hand embroidery and other types of embroidery, and a total of 5 to bullion embroidery, applique, fagotting and stamping.[379] The overwhelming majority of the advertisements

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broiderers had often done bullion work for use on non-military apparel (R. 1059-1063, 1086-1091, 1124-1152). See also Friedensohn, R. 1044-1046; Meyerson, R. 1195, 1199-1201, 1204-1205, 1208; Geller, R. 1238; Alpine, R. 1249-1260; Stern, R. 1261-1265.

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[375] Friedensohn, R. 1087; International Ladies' Garment Workers' Union Exhibit 10; Pleaters, Stitchers and Embroiderers Association Exhibits 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17.

[376] International Ladies' Garment Workers' Union Exhibit 10.

[377] *Ibid.* The remaining 144 advertisements did not specify whether the workers were for home or for factory work.

[378] *Ibid.* Some of the advertisements sought workers for more than one type of embroidery. Hand embroiders were sought in 84 advertisements, spanglers in 54, smockers in 38, workers to do fagotting and applique work in 30 each, pattern makers, stampers and perforators in 29, frame workers in 25, and hand sewers in 7. The type of embroidery work to be done was not specified in 216 advertisements.

[379] Pleaters, Stitchers and Embroiderers Association Exhibits 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17.

sought both factory and home workers. There were 141 such advertisements as compared with only 8 for factory workers exclusively, 5 for home workers exclusively and 14 not specified. In the case of 76 of the advertisements the workers sought were specified as "experienced"; 22 of the advertisements sought sample hands.[380]

[fol. 164] The extent of advertising for workers does not in itself constitute an exact indication of a labor shortage. Even in an abundant labor market it is frequently difficult to secure certain skilled workers.[381] Embroidery concerns which were represented at the hearing had advertised for workers to do crochet beading for hand-embroidery in previous years as well as in 1942.[382]

Furthermore, in evaluating the possibility of adjustment to the prohibition of industrial home work—

> it should be borne in mind that relatively full-time factory employment during the peak season of a substantial portion of a home worker group may be sufficient to produce the volume of work formerly produced by a larger number of industrial home workers since most of the latter group rarely work on a full-time basis even during the busy season.[383]

A. F. Hinrichs, Acting Commissioner of Labor Statistics, Bureau of Labor Statistics, United States Department of Labor, testified that there was no general shortage of labor in the Embroideries Industry.[384] Dr. Hinrichs stated that—

> The efficient utilization of the services of the individual home worker will be promoted by encouraging those individuals to enter factory employment. The prohi-

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[380] Pleaters, Stitchers and Embroiderers Association Exhibits 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17. Three of the advertisements also sought "persons with following to give out work."

[381] Beyer, R. 177.

[382] Friedensohn, R. 1006, 1083; Orloff, R. 1120-1121; Meyerson R. 1201; Alpine, R. 1252.

[383] Weiss, R. 28.

[384] Hinrichs, R. 42-67; see also Weinberg, R. 1598-1599; 1611-1614.

bition of industrial home work tends to accomplish this. * * * It may be pointed out that in order to utilize [fol. 165] the services of all of these people in factory employ*ploy*ment, or a high proportion of them in factory employment, additional provisions may have to be made for the day care of children. Facilities to make possible the labor of women in the factories are being expanded at the present time. On the whole, factory work is more efficient than home work. There can be better supervising, better provision for machine equipment, better subdivision of labor and a more complete exploitation of the time available for work. Hence, the prohibition of industrial home work tends to increase the amount of essential production that can be accomplished by any given number of women. In such a labor market as will exist in the foreseeable future in New York City the prohibition of industrial home work may actually tend to relieve a labor shortage if one ever develops.[385]

These views were supported by testimony that concerns which had formerly utilized home workers found that the work could be performed in the factory far more efficiently, with fewer workers and with no deterioration in quality.[386]

It was contended on behalf of a large concern engaged in the creation and stamping of designs on fabric for art needlework that prohibition of home work in the Embroideries Industry would seriously interfere with the conduct of its business.[387] The concern in question will, however, be affected only indirectly, if at all, by a prohibition of industrial home work in the Embroideries Industry, since the embroidery of the designs is done by embroidery manu- [fol. 166] facturers or contractors to whom the designs are distributed and who employ home workers to produce embroidered models for use in the sale of the stamped art goods by department stores and other selling establish-

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[385] R. 47-48.

[386] Nachman, R. 370-373; see also Dahl, R. 358-359; Price R. 705. The testimony of these witnesses also indicates that many former home workers were brought into the factory.

[387] See the testimony of Joseph L. McCormack, Counsel, Fixler Bros., Chicago, Illinois, R. 926-940.

ments.[388] No home workers are employed directly by the concern.[389] The possibilities of adjustment to the prohibition of home work which are available to embroidery manufacturers and contractors generally will be available to the firms which embroider models for concerns of this type. Furthermore, it is difficult to believe that the use of models to advertise the designs is as essential to the carrying on of the business of these concerns as has been urged.[390] I find that the contention of the stamped art goods concerns is without sufficient foundation to justify the threat to the minimum wage which a continuation of home work would permit.

There was testimony at the hearing that the elimination of home work would be clearly desirable as a matter of business efficiency if it can be done without disturbing major operations in the Industry,[391] and that, although some firms might have some difficulty in finding working space to accommodate home workers brought into the factory, some firms had ample facilities for this purpose.[392] I have already found that prohibition of home work will not involve any substantial difficulties in the Industry.

Although it has been argued that prohibition of industrial home work in the Embroideries Industry will mean the elimination of certain types of embroidery, such as crochet beading, hand embroidery, and bullion embroidery of mili- [fol. 167] tary and naval insignia, the evidence in the record not only does not support any such contention, but indicates rather that production of these types of embroidery may be stimulated and increased. Prohibition of home work will not prohibit any type of work or occupation but will merely compel the transfer of work and occupations formerly carried on in the homes to the factory where the workers may be adequately supervised and their payment in accordance with the minimum wage order for the In-

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[388] McCormack, R. 926-927, 930-933, 937-938. Mr. McCormack testified that about 500 women were engaged in embroidery home work on models of stamped art goods in and around Chicago.

[389] McCormack, R. 931.

[390] McCormack, R. 928.

[391] Friedensohn, R. 991; Orloff, R. 1097; Meyerson, R. 1196.

[392] Meyerson, R. 1196.

dustry guaranteed. The possibilities of adjustment to a prohibition of home work which are disclosed by the record furnish ample assurance that no substantial curtailment of operation will result. All of the operations in question are performed in the factory as well as in the home. It cannot reasonably be argued, therefore, that any prohibition of restriction of crochet beading, hand embroidery, or bullion embroidery of military and naval insignia will result from the prohibition of industrial home work in the Industry.

I conclude, upon the evidence in the record, that reasonable adjustment can be made to a prohibition of industrial home work in the Embroideries Industry.

I also conclude that the need for efficient utilization of labor in time of war makes it especially advisable that the wasteful methods of industrial home work be eliminated.

III. Persons Unable to Adjust to Factory Work

In order to avoid hardship which may be caused home-workers who are unable to adjust or remove themselves to factories, I have determined it advisable to include a provision permitting the employment in homes of persons certified as unable to adjust themselevs to factory work because of age or physical or mental disability or unable to leave home because their presence is required to care [fol. 168] for an invalid in the home and who are certified either as being employed under the supervision of a sheltered workshop or State vocational rehabilitation agency or as having been employed in industrial home work in the Embroideries Industry prior to November 2, 1942.[393] Because relatively few home workers will be eligible to continue home work under this exception, in addition to the fact that some of these will be working under the supervision of governmental or non-profit agencies, I find that no threat to the standards of the wage order will be involved in providing this exception. This exception is similar to the provision made by the President in Executive Order

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[393] I have also deemed it advisable to provide that the requirement of previous industrial home work employment in the Embroideries Industry shall not be applied when the application of this requirement results in unusual hardship to the individual home worker.

of May 1934 permitting exceptions to the prohibitions of home work under the National Industrial Recovery Act, and to those contained in administrative provisions of State prohibiting orders and in the wage orders, as amended, prohibiting home work in the Jewelry Manufacturing Industry, Knitted Outerwear Industry, Women's Apparel Industry, Button and Buckle Manufacturing Industry, Gloves and Mittens Industry and Handkerchief Manufacturing Industry.

IV. Conclusion

Upon the entire record, I find that it is necessary, in order to carry out the purposes of the minimum wage order for the Embroideries Industry, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate prescribed therein, to include terms and conditions in the order which shall provide that no work in the Embroideries Industry shall be done in or about a home, apartment, [fol. 169] tenement or room in a residential establishment, except by such persons as have obtained special home work certificates pursuant to applicable regulations of the Wage and Hour Division authorizing the issuance of such certificates to an industrial home worker who is unable to adjust to factory work because of age or physical or mental disability or is unable to leave home because his presence is required to care for an invalid in the home and who prior to November 2, 1942 was working for an employer as an industrial home worker in the Embroideries Industry (except that if this requirement results in unusual hardship to the individual home worker it shall not be applied) or is at any time engaged in such industrial home work under the supervision of a State vocational rehabilitation agency or of a sheltered workshop as defined in Section 525.1, Part 525, Chapter V, Title 29, Code of Federal Regulations.

V. Posting of Notice

I also deem it necessary under Section 8(f) of the Act to require that every employer employing any employees in commerce or in the production of goods for commerce in the Embroideries Industry shall post and keep posted in a conspicuous place in each department of his establishment where such employees are working such notices of this order as shall be prescribed from time to time by the

Wage and Hour Division of the United States Department of Labor.

The order issued pursuant to this Opinion shall become effective on September 20, 1943.

Signed at New York, New York, this 21st day of August, 1943.

L. Metcalfe Walling, Administrator Wage and Hour Division, United States Department of Labor.

[fol. 170] United States Department of Labor, Wage & Hour Division

In the Matter of: Hearing of the minimum wage recommendations of Industry Committee No. 45 for the Embroideries Industry and the prohibition, restriction, or regulation of homework in the industry.

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Testimony of Benjamin Sprung

(S. M. 1440-1475)

Benjamin Sprung, appearing on behalf of the Manufacturers of Military and Naval Insignia Devices, after being duly sworn, testified as follows:

Direct examination.

By Mr. Allan:

The Witness: There are approximately seven or eight firms in the New York area, who manufacture military and naval gold and silver embroidery insignia devices. These insignia devices are articles which denote the rank, branch of armed services, or specialty of the military or naval officer wearing them. These articles are never permanently attached to the uniform of the officer wearing them. They are only attached by snap fasteners or a few threads. The insignia is manufactured, purchased and sold as a separate and independent article or item. The officer can readily remove it and transfer it from one garmnet or cap to another. This is usually done when the uniform is laundered or cleaned or discarded.

[fol. 171] The embroidery on these articles is made by employees of the manufacturer who owns the article. For instance, a manufacturer who makes a shoulder mark to be worn by an officer, purchases the raw fabric, cardboard, thread, buttons and snap fasteners and processes these items and manufactures the article upon which the embroidery is ultimately placed. His own employees embroider the insignia, thereby completing the item. These embroidered items are therefore separate and complete articles. They are kept in stock by the manufacturers and are made up also for special orders. For instance, when a licensed manufacturer or dealer of military or naval uniforms requires these items, that is, they are licensed by the government, he can obtain them directly from one of our manufacturers. In short, we are the suppliers of these items. Any governmental licensed dealer can carry them in stock separately or attach them to the officer's uniform if he manufactures or sells uniforms. They are accoutrements or accessories to the uniform. These insignia devices may be seen in the windows of army and navy stores where they are sold separate and apart from uniforms.

Although only the New York firms engaged in the business of manufacturing these military and naval insignias appear at this hearing and although to our knowledge there are only approximately a dozen firms throughout the entire United States specializing in this form of embroidered insignia these New York firms represent about 95% of the total volume of production throughout the country of these insignias.

In the production of these items a very high standard of workmanship and material is demanded by the military and naval regulations. For instance, the naval regulations require that the insignia be hand-embroidered with bullion; of definite specification as to format; and rigid standards of workmanship, craftsmanship and skill. This work is [fol. 172] entirely done by hand. The ordinary hand-embroiderer or crochet-beader is unable to and cannot perform the operations required for the manufacture of bullion embroidered insignia. A special aptitude, skill and artistry is required which few of such workers possess. For one who is capable of learning the art and has already had training in hand-embroidery a period from at least six months to a year is required before that person could be-

come sufficiently proficient to perform the operations of bullion embroidery; and then only upon a limited number of the many items of naval and military insignia worn by the officers of both the army and navy and the enlisted personnel.

Because of the demands of the present war emergency and because of the woeful lack of and scarcity of help, all of the firms engaged in manufacturing military and naval insignia are working at capacity and there is an extremely large backlog of orders which the manufacturers are find-it extremely difficult and impossible to fulfill.

The manufacturers estimated that five times the presently employed number of military embroiderers possessing a fair degree of skill and experience would be necessary to keep up with the demands made upon us.

The New York firms in the aggregate employ approximately 300 workers who are engaged in this type of embroidery work. Of these, approximately 200 or over 66⅔% are home-workers. It is a fact that the highest skilled workers are found predominantly in the home-workers group. One reason for this is the comparatively high age average for home-workers as compared with factory workers.

For instance, one employer reported that the average age of the Homeworker women working for him was 52 years. Another reports the average age of home-workers is between 55 to 60.

The experience of the manufacturers of the group I speak for is that it has always been very difficult to get sufficient [fol. 173] workers to do this type of work and today this condition is even more aggravated. One reason for this is the length of time and the difficulty in training workers. Hand-embroidery workers have selected this type of work for the reason that it can so easily be done at home. At the present time, when factory jobs are available for women in defense industries at good rates of pay, our manufacturers have found it difficult to secure learners. In the past many years attempts to obtain new employees by means of advertisements in foreign language and English newspapers were dismal failures. Our experience for the past eleven months has been such that constant advertising resulted in our ability to secure no experienced workers whatsoever. The few home-workers which were obtained were secured either through word of mouth or by the e[illegible]-

ployers inducing former workers who had left the industry to assist us in this emergency. Higher rates of pay was a further inducement to them.

Nearly all of the home-workers engaged in military embroidery state that they would not under any circumstances work in factories for one or more of the following reasons:

(1) Poor health and advanced age of either themselves or some of their relatives for whom they are responsible.

(2) The necessity of supervising children for the home generally. Practically all of the home-workers are women and most of them are married. For instance, for one concern where 15 inside workers and 31 home-workers are employed, 5 of the 15 inside workers are married, whereas 26 of the 31 homeworkers are married. In another plant where there are 86 home-workers, 74 of them are married.

(3) The distance of the home-worker's residence from the factory. One manufacturer reports that all of his home-workers live outside of New York City.

[fol. 174] (4) A great many of these workers consider themselves artisans who would not under any circumstances work in a factory.

(5) Physical handicaps or the necessity of taking care of physically handicapped relatives, which I have also included in number one.

Most of the women homeworkers work merely to supplement their husband's earnings and not because of absolute necessity.

If homeworkers are eliminated or restricted to those who are physically handicapped or who have to take care of physically handicapped persons, then since 66⅔% of military embroiderers are homeworkers, the production of military embroidered insignia would be hopelessly curtailed. The elimination of homeworkers from this field would not result in the transfer of these workers from home to factory. There would be an inability to meet the requirements of the military and naval departments, and consequently would definitely interfere with and impede the war program.

It should be stressed that none of the evils attendant upon homeworkers in the past history of other industries can be found present among the homeworkers who embroider military insignias. The earnings per hour for a forty hour week among these workers range from 40¢ to 90¢. Most workers earn at least 68¢ per hour. It should also be pointed out that whereas in other types of embroidery there is a constant and considerable change and variation in style, making the settling of piece rates a difficult process, in this field the insignia device is standardized by military and naval authorities and do not change perhaps more than once in a decade. Consequently, it is a simple matter to fix the piece rate for each item, and to ascertain the time spent by homeworkers in making each item. The record [fol. 175] keeping provisions of the Wage and Hour Act are thus complied with without difficulty.

Because of the national emergency, our employers have been compelled to induce older workers, many of whom are well over the age of 50, who have ceased working altogether and who are not employable as factory workers, to return to this type of work. Such employers, however, flatly refuse to work in factories. If homework were curtailed, the military force would lose the specialized services of these people.

Military embroiderers are well paid. Since this is so, there is no economic compulsion to work more than eight hours a day in order to earn a fair day's pay even under today's high standards. It has been the experience of the industry for the piece rate of a particular insignia device to rise rather than decline once it has been set. Even prior to the present emergency, the industry has never had a sufficient supply of labor. In this type of work there are no seasons or peak employment or unemployment periods and anyone capable of doing this type of work could always procure employment. He would be hired immediately. Consequently, this specialized field of embroidery never provided fertile ground for the exploitation of labor.

Objections which have been raised to homework generally do not apply to the military embroidery field. Because of the degree of skill required, a homeworker's children cannot possibly assist the homeworker to do this work. Therefore, not only do we find no such violations of the child labor provisions of the Fair Labor Standards Act, but there

is no danger whatsoever of such violations occurring. Furthermore, because of the scarcity of employees available for this work, assistance of homeworkers by neighbors or other members of the family will not be encountered. Since this work is performed upon a small frame and requires no machines or complicated equipment of any kind, there [fol. 176] is no danger of the conversion of their homes into factories. A week's supply of material can be put into a shoe box and carried under their arm.

With regard to homeworkers, the record of this industry's compliance with the Fair Labor Standards Act is excellent; there have been no violations of the minimum wage standard and all manufacturers heartily endorse the establishment of a 40¢ minimum hourly wage rate, but vigorously object to any prohibition or restriction of homework among our manufacturers.

Q. Mr. Sprung, can you tell us the number of separate and different items which the military and naval embroiderers are required to manufacture to comply with the Government's requirements?

A. I have never counted them up, but I imagine there are more than sixty.

Q. Now, I show you this book which purports to be a volume published by the United States Navy, with respect to uniform regulations, and ask you to look at it and explain what that book is and from that tell us, if you can, the number of different items that are manufactured by the embroiderers.

A. This is a copy issued by the United States Navy, "Uniform Regulations". It covers every uniform and every article that goes on a uniform that is worn in the Navy, any branch of the Navy. It will take me a few minutes to check through, I have already marked them up, to tell you how many items there are.

Q. Can you give us an estimate?

A. There must be about 60.

Q. About sixty items?

A. Yes, sir. Pardon me, these are embroidery items I am speaking of.

Q. Yes, I am confining myself strictly to items which require embroidery.

A. Hand embroidery.

Q. Hand embroidery. Now, among the sixty items which are prepared and manufactured and processed by the mili-

tary and naval embroiderers, do they prepare the process [fol. 177] and manufacture the items which I now show you and which have been previously marked for identification in this record?

A. Yes, sir, they do.

Mr. Allan: I offer this entire page as one exhibit into the record.

Mr. Meikeljohn: Is that your Allan exhibit you wish to put in evidence?

Mr. Allan: Yes, as one exhibit.

The Witness: One of them is an Army insignia. The others are all Navy.

Examiner Campbell: Without objection, the samples of hand embroidery, seven in number, of the insignia of the Army and Navy will be included in the record of this hearing as Exhibit No. 1 of Samuel S. Allan.

Mr. Allen: All right, thank you.

(Samuel S. Allan's Exhibit No. 1 was received in evidence subject to the provisions set forth by the Examiner.)

By Mr. Allan:

Q. Now, Mr. Sprung, the items of insignia which you spoke about a little while ago refer to various classes of officers, do they not, commissioned officers?

A. Yes, it is the commissioned officers, the chief and warrant officers, and for the enlisted men. I might say at this point, there seem to be about 75 or 80 items.

Q. There are about 75 or 80 separate and different items?

A. Yes.

Q. Containing hand embroidery which are manufactured and produced by the group of military embroiderers here?

A. Yes, sir.

Q. Now, in the preparation and processing of these military insignia, are you required to follow the specifications laid down by the United States Navy?

A. Yes, sir, strictly.

[fol. 178] Q. In the book which is now before us, can you find the regulations which refer to the manner and method of manufacture?

A. Just a description in the regulations.

Q. And, is there a separate volume or leaflet which is published by the United States Navy which contains the

specifications under which they are to be prepared?

A. There is, sir.

Q. I show you this leaflet, No. 71D1, dated October 1, 1931, superseding No. 55D12, June 1, 1927, and ask you to tell us whether or not this pamphlet contains the specifications which you are now to follow or the manufacturers of insignia, are now to follow in the preparation and production of those items?

A. Yes, this is the official specification now prevalent issued by the Navy Department.

Mr. Allan: Now, I offer this in evidence.

Examiner Campbell: Without objection the Navy Department's specification referred to by Mr. Allan will be made a part of the record of this hearing and marked Samuel S. Allan's Exhibit No. 2.

(Samuel S. Allan's Exhibit No. 2 was received in evidence subject to the provisions set forth by the Examiner.)

By Mr. Allan:

Q. Now, in the volume which you have before you, Mr. Sprung, are there any photographs containing the many items which the military and naval embroiderers manufacture and produce for the Navy and Army?

A. Yes, there are.

Q. Now, can you point out in that volume those particular photographs?

A. Yes, I can, one indicated on plate No. 31 and on plates 65, 66, 67, 68, 69, and 70.

[fol. 179] Mr. Allan: Now, I offer those plates in evidence as a further exhibit with this qualification, sir, that I will have to furnish photographs of those in place of the originals because of the necessity of keeping the particular volume intact as it is.

Mr. Lieberman: Off the record.

(Discussion off the record.)

Examiner Campbell: Without objection, photostatic copies in duplicate of plates Nos. 31, 65, 66, 67, 68, 69, and 70, contained in the uniform regulations of the United States Navy will be included as the Samuel S. Allan Exhibit No. 3 in the record of this hearing.

Mr. Allan: Thank you, sir.

(Samuel S. Allan's Exhibit No. 3 was received in evidence subject to the provisions set forth by the Examiner.)

By Mr. Allan:

Q. Now, Mr. Sprung, in the preparation, processing, and production of the various items, I have selected one item which you are to explain to the Hearer, the process from its very inception to its final completion and show you this mounting and ask you to state after examining the mounting and explain for the purposes of the record the processes in the production of an insignia worn by a lieutenant of the United States Navy, known as a shoulder mark, and ask yo first whether or not the fabric, the cloth is purchased by the manufacturer or the embroiderer in this instance?

A. Yes, this cloth is purchased in large bolts, many yards to the bolt.

Q. Will you proceed to explain the entire process from the time the bolt of cloth is purchased until the time the article is finished?

A. A large strip of this material is placed on a table, and the particular blank of the design which is sought to be [fol. 180] reproduced on it, or produced on it, is pasted on there.

Q. First, let me ask you is the cloth cut into separate pieces?

A. First we use a large piece of cloth. A large piece of cloth is used. It isn't cut separately—we cut it in pieces about three yards long. Many of these blanks are put upon it, in this case a star, we paste a piece of cardboard—a cardboard star is pasted—or many cardboard stars are pasted in regular order on the large piece of cloth, so located that each one can be cut up into the beginning of a shoulder mark which is sought to be made. This is called a blank. This blank is prepared in the shop. Then this blank in this format, being a piece of cloth about 3 inches wide and 6 inches long with the cardboard stars in the center of it, of whatever insignia is sought to be made is given out to the hand worker, and when it comes back with the stars embroidered on it with bullion——

Examiner Campbell (interposing): As in your exhibit there?

The Witness: As I showed it. That is mounted thereafter on a cardboard filler approximately the size of the finished item.

By Mr. Allan:

Q. And do you own the cardboard filler?

A. We buy that cardboard filler, yes, sir. When that is properly pasted on it looks like the item I am now holding up.

Q. The cloth is wrapped around this filler?

A. And glued on to it.

Q. And glued right on to it, yes.

A. To that is attached a strap and lining or tongue and lining back. We call it either tongue or strap.

Q. A leather strap?

A. A leather strap which itself is sewn in the shop on to the lining, that when it is placed together with the last [fol. 181] piece I showed from which the finished item, almost the finished item, a hole is punched here and another one here and the button inserted.

Q. Is a hole placed on the leather strap?

A. A hole is placed in the leather strap and a corresponding buckle or snap button is placed on the other side of the entire object so that the leather tongue can be snapped shut as shown in this finished item upon which the particular rank of lieutenant appears to have been placed, in addition to the star.

Q. Now, will you please insert these back into their respective places. Now, every operation that you described and every piece of material which you describe that goes into the manufacture of this item is done by the military or naval embroiderer?

A. It is.

Q. And that is his product?

A. That is right, sir.

Q. And the final or finished item is the unit or article which is then delivered to the United States Navy or Army as the case may be?

A. Yes, sir.

Mr. Allan: I offer in evidence the mounting from which the witness has testified.

Examiner Campbell: Without objection the cardboard containing the items referred to in the testimony of Mr.

Sprung just given will be included in the record of this hearing as Samuel S. Allan Exhibit No. 4.

(Samuel S. Allan's Exhibit No. 4 was received in evidence subject to the provisions set forth by the Examiner.)

By Mr. Allan:

Q. Now, taking the lieutenant's shoulder mark, which is the finished product, can you tell us how and in what way that is attached to the uniform?

[fol. 182] A. The tongue snap is opened, and the tongue itself is inserted through the loop on the shoulder of the uniform and then the button snapped to it, and that is exactly how it holds on the uniform. These are worn on khaki work uniforms, white dress uniforms, or on an overcoat, but it can be taken on or off for cleaning, whenever the uniform is cleaned, or discarded or to replace this if this happens to be damaged.

Q. Now, without further burdening this record, what I want you to tell us is whether or not each and every item which is manufactured and processed by the military and naval embroiderer is an article made of fabric which the embroiderer owns as the result of a purchase made by him, processed in his own plant either by sewing or pasting as the case may be, and finished by the embroiderer into a final and finished product, is that correct?

A. One small correction.

Q. What is that, sir.

A. You used the word embroiderer in the beginning where you probably meant manufacturer. If the stenographer will read the question, I will point out.

Q. Yes, by the manufacturer who is also an embroiderer who is appearing in this case in this hearing.

A. My answer is yes.

Mr. Allan: That is all.

Examiner Campbell: Questions, Mr. Lieberman?

Cross-examination.

By Mr. Lieberman:

Q. Mr. Sprung, you are a manufacturer?

A. No.

Q. Will you please state to us your profession or occupation. I wasn't present when you started?

A. I am connected with Vanguard Military Equipment Corporation, one of the manufacturers of naval and military devices.

Q. In what capacity?

A. Administrative and executive capacity.

[fol. 183] Q. And you have been connected with that firm for quite a while?

A. Yes, I have been connected with it since about 1935.

Q. And when you testified today in answer to the various questions propounded by Mr. Allan, have you testified as to your knowledge of the firm with which you are connected or other firms in the industry as well?

A. Both.

Q. Are you acquainted with the other firms in the industry?

A. Yes, sir, I am. There aren't very many, another five or six.

Q. Now, the firm that you are connected with I think you said is Vanguard Military Equipment?

A. Yes, sir.

Q. Does that firm limit its activity to the embroidery work, or it has various equipment for the military?

A. So far as the manufacturing is concerned, that is all they manufacture.

Q. And other articles they purchase and sell?

A. Yes, sir.

Q. Did I understand you to say that these embroidered articles to which specific reference was made by Mr. Allan, are sold also in retail stores?

A. That is right.

Q. And those that are sold in the retail stores, are they manufactured in accordance with Government orders to this firm?

A. Yes, sir.

Q. And the orders sold——

A. (Interposing) Not the orders, you mean the regulations, which is it?

Q. I asked the orders.

A. On no private orders.

Q. When Mr. Allan asked you whether these various emblems and stars are delivered to the Navy in accordance with their orders, you meant then to say that if it is manufactured under order by the Navy, then it is delivered to the Navy.

A. Orders that are made on the Navy contracts are delivered to the Navy.

Q. And if the order is from a private concern, then you deliver it to that private concern?

A. Only if the private concern is a licensed concern.

[fol. 184] Q. In other words, at this present time, the concern has to be licensed, but so far as you, the maker of the embroidered articles, you work for that concern in accordance with your agreement with that concern and not with the Navy?

A. We don't work for any concern.

Q. At the present time.

A. We sell them, we don't work for them.

Q. In other words, you make it up and you sell?

A. That is right, we don't work for anybody.

Q. Are Government inspectors located in your respective establishments to find out whether the work is done in accordance with the specifications?

A. No, sir.

Q. Are you acquainted with the fact that in all other articles when orders are placed by the Army and Navy, an inspector of the Army and Navy is in that particular shop to see whether the orders are made in accordance with the requirements?

A. I don't know.

Q. You said that these articles are manufactured in accordance with the specification of the Navy, is that correct?

A. That is right, sir, regardless of where they go to.

Q. Is it not true that any article manufactured for the Government or for the Navy must be manufactured in accordance with specifications of the Navy?

A. That is right.

Q. So that, therefore, if hats or shoes or anything else are manufactured for them, it must be in accordance with specifications?

A. I don't know; I suppose so; I don't make the other articles.

Q. You said you are acquainted with the other firms in this branch of work?

A. I am.

Q. Are you acquainted with the firm Gemsco, Inc.?

A. Gemsco?

Q. Gemsco?

A. Gemsco, yes.

Q. Do you know where it is located

A. Yes.

Q. And how long have you known that firm?

A. The first I heard of them was about 1935.

[fol. 185] Q. Do you know where they are located?

A. I do.

Q. And do you know what they manufacture?

A. Not everything. They are a very large firm. I know lots of things they make.

Q. Is it not a fact that that particular firm manufactures hand embroidery, Schiffli, Bonnaz, Club, school, industrial, uniform, and sportswear?

A. I am not aware of it.

Q. Will you please look at the telephone directory, and I ask you whether the firm of Gemsco, Inc. is the firm about which we are talking is this particular firm to which you have reference?

A. That is right.

Q. This is the firm?

A. That is right.

Q. And is it not a fact that according to the telephone directory—and I have reference to the classified telephone directory of August 1942—there appears the following: "Gemsco, Inc., hand, Schiffli, Bonnaz, club, school, industrial, uniform, sportswear", and the address is 395 Fourth Avenue at 28th Street, New York City, Telephone, Lexington 2-3060?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Are you acquainted with the firm of Hertz & Co.?

A. Yes.

Q. And Hertz & Co. is one of the firms to whom you have reference?

A. Yes.

Q. Now, I ask you is it not a fact that that particular firm manufactures various articles in connection with the military embroidery?

A. I don't know. I am only interested in one angle of this, and that is the military insignia.

Q. First, be good enough——

Mr. Allan (interposing): Let the witness answer. Mr. Lieberman, please.

Mr. Lieberman: Let us not start to quarrel. I will come back to my question. What is the use of wasting time? [fol. 186] Mr. Allan: You are not going to quarrel with me. I think this witness is entitled to receive the courtesy every witness received here and be permitted to answer fully and completely.

Mr. Lieberman: May the record show there is not the slightest attempt on my part to be discourteous or deprive him of any answer.

Mr. Allan: Let the record show Mr. Lieberman, perhaps inadvertently interrupted the witness when he was about to complete his answer.

By Mr. Lieberman:

Q. Mr. Sprung, is that firm located at 753 Broadway?

A. That is right.

Q. I show you again the same classified telephone directory, and I ask you to look at page 313 of the telephone directory. Will you please look at it?

A. I am looking at it.

Q. Does there appear the name of Hertz & Co.?

A. That is right.

Q. And the address, 753 Broadway?

A. That is right.

Q. Corner 8th Street?

A. That is correct.

Q. And this is the firm to which you had reference?

A. That is right.

Q. Will you please read from the telephone directory as to what articles according to this directory appear to be manufactured by that firm? Read it for the record.

Mr. Allan: Before you answer—Major, I don't want to interrupt Mr. Lieberman. I trust you are not going to consider my action rude, but I should like to have the record show that our appearance here relates only to the question concerning embroidery. And whether military embroidery and naval embroidery, and whether the particular [fol. 187] concern is engaged in manufacturing shoes, ladies' underwear, or men's hats, or anything else is not of any importance. It is not material to the hearing. We are not going into that. I don't see how that has anything to do with the issue. It is only a waste of a lot of time.

Examiner Campbell: Mr. Lieberman, will you give us a statement covering what you are driving at?

Mr. Lieberman: In my opinion, it has a direct bearing for reasons that I thought I will state later, but I may as well mention some of it right now. If this very firm is manufacturing all kinds of embroidery articles under the very same name of that firm, and when an exception is sought by that firm just for one branch of it, I think the Administrator ought to know all the facts bearing on that issue, especially when it is done by that very same firm.

Mr. Allan: I will tell you what I will do. I will state for the record, and I will put it in writing that I will advise the Administrator of every other branch of work, if any, any of the concerns I am representing is doing in addition to military embroidery.

Mr. Lieberman: So why should there be any objection on your part to having that read then?

Mr. Allan: It wastes time.

Mr. Lieberman: I believe we wasted more time talking about it than it would have taken the witness to answer. Wait a minute, Mr. Witness. I don't want at the present time to argue with you, Mr. Allan and I will argue out the point. You will be good enough, if you are so directed, to answer that question. Then I am sure Mr. Allan will bring out from you whatever else he deems advisable. May I have an answer then to that question?

Mr. Allan: Before we do, let us get a ruling.

The Witness: You directed me to do something?

[fol. 188] Examiner Campbell: Will you answer the question?

The Witness: I wasn't asked a question, I was asked to read.

By Mr. Lieberman:

Q. Mr. Sprung, have you looked at this telephone directory?

A. I looked at it, yes, sir. I answered all your questions.

Q. Will you be good enough to read for the record what articles according to this telephone directory appear to be manufactured by the Hertz & Co.?

A. No articles appear to be manufactured. I am sorry, you will have to read that ad yourself as you see it. I have another thought about that I can tell you.

Q. You decline to read this particular article?

A. I decline to read it as you have stated in that question, articles you said that appeared to be manufactured by this concern. Nothing appears to be manufactured.

Q. Will you please read?

A. I will read an ad that is in there.

Q. You will read the ad that appears in there?

A. I will read the ad that appears.

Q. Will you kindly read the ad that appears under the name of Hertz & Co. in this?

A. "Hand, Singer, Schiffli, Bonnaz for School, Uniform Trade, Military and Clubs. Phone for Prices and Samples, 753 Broadway, cor. 8th Street * * * Algonqn 4-9152."

Mr. Lieberman: Thank you.

The Witness: You are welcome.

By Mr. Lieberman:

Q. And are you acquainted with the firm Tubell & Co.?

A. Yes, sir.

[fol. 189] Q. And that company is located at 25 Waverly Place?

A. Yes, sir.

Q. Does the ad of that company appear in the telephone directory on Page 315?

A. I will read the ad, save you time.

Q. All right, I appreciate your cooperation.

A. "Tubell & Co. Mfrs. of Hand Metallic, Singer, Bonnaz, and Schiffli Embroideries for Military, Uniform, School, Sportswear Trades 25 Waverly Pl (nr Bway) . . . Algonqn 4-6963."

Q. And all the names of the firms which we mentioned in my examination of you appear in the classified directory for embroidery?

A. Yes, sir. Let me see that. It might be under something else. It appears they are under here.

Q. All right.

A. Yes.

Q. Could you please tell us whether you firm received contracts from the Navy for the manufacture of the various articles you referred to there on the direct examination in excess of $10,000?

A. I don't know the amounts. I think some of them are in excess of $10,000.

Q. Will you please tell us whether you know or not of any prohibition of homework under contracts exceeding $10,000?

A. I do know.

Q. Does the contract prohibit it?

A. The contract, no. Not the contract.

Q. Does the regulation of the government prohibit the manufacture of such articles at home?

A. The regulation of the government?

Q. Under the Quartermaster.

A. No. No.

Q. Do you know whether under the Walsh-Healey Act which makes every contract above $10,000 subject to that law, whether homework is prohibited?

Mr. Allan: At this time, Mr. Examiner, I have given Mr. Lieberman a lot of latitude in that field and I don't see why we should go into that field, this work here comes under the prohibition or it does not come under [fol. 190] the prohibition, anything that this concern has or what contracts it has is nobody's business, for we are talking about operations, a particular operation which is being performed, hand embroidery, and not the business affairs of the concern whatsoever and I think that objection is well taken, sir.

Mr. Lieberman: You want to hear me on the objection?

Examiner Campbell: Yes.

Mr. Lieberman: I believe my question is having a bearing on the direct issue, because if my assumption is correct that the Walsh-Healey Act prohibits homework and if this firm takes such orders, then under those orders and the law it couldn't manufacture those articles in homework and therefore any regulation on prohibition under the Fair Labor Standards Act could not affect it by any means because it would be prohibited anyway.

Mr. Allan: We are not here trying whether or not there has been a violation of any act, and I think Mr. Lieberman is going not alone very far afield, but his statements are getting to be indeed very annoying, sir. I don't think it is his business to inquire into this thing.

Examiner Campbell: Mr. Lieberman, if the witness answered your question and the next question divulged the fact they used homework on that, would he not thereby be incriminating his firm?

Mr. Lieberman: My answer is, first, I may not ask the question that you thought I may ask. Second, if the witness thinks that he will incriminate himself and he will decline to answer on the ground that he may incriminate, it may be another story, but so far we haven't any reason to believe that the witness would incriminate himself by the answer.

Mr. Allan: I submit, your Honor, and I state again that we are not here trying the violation of any law and I think [fol. 191] it certainly is improper cross-examination at this hearing.

Mr. Lieberman: I want the record to show that the purpose of my question is not to show whether they violated that law at all. My main purpose is simply to find out what is the situation existing in this firm as well as others similarly situated in connection with the production of military articles referred to.

Examiner Campbell: There seems to me to be a legal question involved here, that I want to get some advice from counsel on. Excuse me, just a minute.

(Discussion off the record.)

Examiner Campbell: Mr. Lieberman, I think I am ready to rule this way, that your question as to the witness' familiarity with the requirements of the Walsh-Healey or Public Contracts Act are competent to the extent that they do not involve any disclosures as to the compliance or non-compliance of the witness' firm with such requirements.

Mr. Lieberman: All right, then, let the witness answer.

Examiner Campbell: When they tend to do that, they are not competent. Will you read the question back, reporter, please?

(The question was read by the reporters.)

Mr. Allan: I raised the objection to that question, sir

Examiner Campbell: I have to rule that that in itself is a competent question.

Mr. Allan: I take exception, sir.

The Witness: The answer is yes.

By Mr. Lieberman:

Q. Does your firm employ any workers in the inside plant?

A. Yes.

[fol. 192] Q. How many?

A. 19.

Q. And for how long did the firm employ that many?

A. For the last two years.

Q. Are all these 19 engaged in one kind of work?

A. They do embroidery work. I am talking about embroiderers. We have 19 embroiderers. There are many more people. I assumed you meant embroiderers.

Q. I am glad you mentioned it because I may want to know whether there are other hand workers.

A. No, there aren't any.

Q. When you say other people you mean sales people or people having nothing to do with the preparation of the articles?

A. Nothing with embroidery, that is right.

Q. My question wasn't addressed to that. How long has your firm been engaged in embroidery work for the Army or Navy?

A. Since 1935.

Q. And during that period until now, the approximate number of inside hand workers was 19?

A. Oh, no, I said for the last two years. Before that it was less.

Q. How many was there before that?

A. It varied to about 12.

Q. And about how many homeworkers has your firm now outside of your plant, I am referring to homeworkers?

A. 32.

Q. And this number of 32 are just during the last two years?

A. That is right.

Q. And prior to the two years did your firm have homeworkers?

A. Yes.

Q. How many?

A. About 20.

Q. So that during the last two years your firm increased the number of homeworkers by 12.

A. Yes.

Q. It that correct, during the last two years the firm increased the number of inside handworkers, referring to embroidery, by 7 did you say?

A. That is right.

[fol. 193] Q. Are all the articles manufactured by your firm consisting of bullion embroidery or are there any other kinds of embroidery manufactured by your firm?

A. No, there is no other kind of embroidery manufactured by our firm?

Q. Only bullion embroidery?

A. Only bullion.

Q. Is any machine work done by your firm in connection with embroidery on the articles you had referred to?

A. No, sir.

Q. May I show you one of the 7 articles included in Allan's Exhibit 1?

A. Refers to the——

The Witness (interposing): Rating badge, Major.

Examiner Campbell: Refers to Warrant Officer's insignia, United States Navy.

By Mr. Lieberman:

Q. Will you please state whether any part of the work on this particular specimen is performed on the machine?

A. We buy the blank and we embroider the handwork on it. What else is done by machine, I don't know. I said what else is done by machine, I don't know.

Mr. Lieberman: You see, but I like to get it in retail instead of wholesale, if you don't mind. Will you please look at this particular specimen and point out—I withdraw that. May I ask you whether this part of the work is done on a machine?

A. I don't know. It looks like it.

Q. Would you say that in so far as this particular work is concerned——

A. (Interposing): Which?

Q. This specimen is concerned——

A. (Interposing) Yes.

Q. There is a part of it which is done by hand and a part of it done by machinery?

A. I know only about the part that is done by hand.

[fol. 194] Q. Is there another part of this which is not done by hand?

A. There may be. I am not sure.

Q. May I suggest, Mr. Sprung, I think we will get along much better if you will do your best to give me your answer to the question.

A. What I don't know, I can't answer. I am sorry.

Q. I am asking you now whether this part of the work which I pointed out to you is done on machine or by hand?

A. Maybe. I don't know. I have no knowledge.

Q. Is this part of the work done by your firm?

A. No, it isn't. I told you we buy this blank. It is called a blank.

Q. You buy, and please point out the part you call the blank on this.

A. The blue serge containing the red material on it.

Q. That is purchased by you from somebody else?

A. Yes, sir.

Q. So in so far as this specimen is concerned, the cloth on which the embroidery is made by you is—I withdraw that. In so far as this specimen is concerned, the cloth upon which your firm attached the embroidery belonged to somebody else before you attached the embroidery.

A. No, sir, it belonged to us when we attached the embroidery.

Q. And is the cloth purchased by you from another one who attaches the part which apparently was made by machine on this work?

A. Let me hear that question again, please.

Mr. Allan: There is no testimony here that it was made by machine, sir. I think Mr. Lieberman——

Mr. Lieberman (interposing): He said apparently.

Mr. Allan: We don't know whether it is apparent or not.

Examiner Campbell: That question seems to be all right.

Mr. Allan: I do not mind if he will try to get it from this witness.

[fol. 195] The Witness: May I have the stenographer read me the question, please?

Mr. Lieberman: I will reword that question for you.

By Mr. Lieberman:

Q. What term is used technically for the embroidery put upon this specimen? Is this the eagle?

A. The eagle. You are speaking of the hand embroidery?

Q. I am talking about hand embroidery. And underneath that eagle appears a certain insignia. What is that called technically?

A. A propeller.

Q. A propeller. Now outside of the eagle and propeller on this specimen, is there any other work done by your firm on it?

A. Oh, yes. As it appears on this blank, no. I thought you wanted the finished——

Q. (interposing) I only refer as it appears on this blank.

A. No, no the work.

Q. The cloth upon which the eagle and propeller are attached is bought by your firm or is it not bought by your firm from another concern?

A. I said we bought the blank. That is called the blank.

Q. And when you say the blank, that includes the cloth?

A. The blank consists of the blue cloth with the red stripe on it as you show it.

Q. So when you attached the embroidery, some other concern cut that piece of cloth and attached the other parts on it?

A. Let me have the first part.

(The question was read by the reporter.)

The Witness: No, that question isn't very clear. Not when we attached, when we bought it.

[fol. 196] By Mr. Lieberman:

Q. Do you recall answering Mr. Allan that a strip of goods three yards long are first cut in connection with the making of stars?

A. That is right.

Q. I ask you now whether in connection with the making of this eagle are long strips of cloth cut by your concern?

A. No.

Q. So the part that you call blank, which consists of a cloth and what other trimming on it—what is this trimming technically called?

A. The embroidery.

Q. How will you distinguish this embroidery from the embroidery put on this particular specimen by your concern?

A. I don't know. We don't make it. I don't know.

Q. Will you please, then, describe for the record what particular work is done by your concern on this specimen after the blank which consists of the cloth and the kind of embroidery appearing here in red, apparently called embroidery, is purchased by you?

A. We place our blank on it, the blank in the shape of an eagle and propeller, which is done by glueing a cardboard stamped affair, which we stamp out in our shop, that eagle and propeller guide, acts as a guide, is pasted on to that cloth and that's given out to the embroiderers or if it's done in the shop it's done by our embroiderers in the shop. They embroider that eagle and propeller over the design or blank, and when it's brought back to us we finish it off into a different design, in the finished design.

Q. The embroidery outside of the hand embroidery placed by your firm is called "chevrons" is it not?

A. That's right, sir.

Q. And the chevrons are attached to the cloth by the manufacturer from whom you buy the blank?

A. I assume so.

[fol. 197] Q. When the blank is purchased by you does it consist only of the cloth or as well of the buckram attached to this particular specimen?

A. Some do and some don't.

Q. Will you please look at this specimen in my hands, which is one of the seven numbers in Allan Exhibit 1? I ask you whether the buckram has been attached to the blank before you purchased it?

A. There is two buckrams on here. One is attached to the blank when we buy it and the other is placed on there by our embroiderer.

Q. When you say two buckrams, the buckram which covers the entire blank has been attached by the manufacturer of the blank, is that correct?

A. I suppose so.

Q. I ask you would you be good enough—— .

A. I suppose so.

Q. And when you say the other piece of buckram you mean the buckram which is subsequently attached to cover the space on which the eagle and the propeller are used?

A. That's right.

Q. Is that correct?

A. That's correct.

Q. I show you another specimen from the seven numbers, part of S. Allan Exhibit 1.

Examiner Campbell: Which is a captain's shoulder strap.

By Mr. Lieberman:

Q. Which is a captain's shoulder strap. Will you please state whether any work is performed on this strap on a machine?

A. No. It is all hand work.

Q. Is all the embroidery used on this strap bullion, or any other kind?

A. It is all bullion. There is one piece of silk thread.

Q. Is that the inside?

A. The inside.

[fols. 198-199] Q. In connection with the manufacture of this strap is the goods first cut in your factory?

A. Yes, sir, all made from raw material, the whole thing.

Q. The embroidery is done by the homeworkers?

A. No——

Q. Or by handworkers?

A. That's right, by handworkers.

Q. Subsequent to the making of the embroidery is there any pasting done between the two pieces?

A. Yes, in our shop.

Q. And the pasting is later on done in the shop inside?

A. That's right. By us.

Q. That is done also by another kind of handworkers?

A. Yes.

Mr. Lieberman: That is all.

Mr. Allan: That's all.

Mr. Kaliski: I don't know whether Mr. Meiklejohn wanted to ask questions or not.

Mr. Allan: We will furnish them with the photostats of this.

Examiner Campbell: Let us take a recess of about five minutes for Mr. Meiklejohn.

Mr. Friedman: Major, I understand he is over at the Wage and Hour Division.

Examiner Campbell: We find we can't have this room after 5:30 so we have to go to Room 1610, 165 West 46th Street.

(Mr. Meiklejohn enters.)

Examiner Campbell: Do you have any questions for Mr. Sprung, Mr. Meiklejohn?

Mr. Meiklejohn: No I believe not.

Examiner Campbell: Apparently there are no further questions for you, Mr. Sprung.

(Witness excused.)

* * * * * * *

[fol. 200] REGULATIONS

The following Regulations, Part 633.100-112 applicable to the employment of industrial home workers in the Embroideries Industry are hereby issued pursuant to Sections 8(f) and 11(c) of the Fair Labor Standards Act of 1938, and Section 633.3 of the Regulations of the Wage and Hour Division. These regulations shall become effective March 31, 1944,* and shall be in force and effect until repealed [fol. 201] or modified by regulations hereafter made and published.

Signed at New York, New York, this 21st day of August, 1943.

L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor.

Published in Federal Register September 2, 1943.

Whereas, Section 8(f) of the Fair Labor Standards Act of 1938 provides as follows:

> Orders issued under this section shall * * * contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. * * *

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* As amended November 9, 1943. 8 F. R. 15362.

and

Whereas, Section 633.3 of the wage order for the Embroideries Industry issued pursuant to Section 8(f) of the Act provides as follows:

> No work in the Embroideries Industry, as defined herein, shall be done in or about a home, apartment, tenement, or room in a residential establishment after March 31, 1944,* except by such persons as have obtained special home work certificates issued pursuant to applicable regulations of the Wage and Hour Division, authorizing industrial home work by a worker who—
>
> [fol. 202] (1) (a) is unable to adjust to factory work because of age or physical or mental disability; or
>
> (b) is unable to leave home because his presence is required to care for an invalid in the home; and
>
> (2) (a) was engaged in industrial home work in the Industry, as defined, prior to November 2, 1942 (except that if this requirement shall result in unusual hardship to the individual home worker it shall not be applied); or
>
> (b) is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or of a Sheltered Work Shop, as defined in section 525.1, Part 525, Chapter V, Title 29, Code of Federal Regulations.

and

Whereas, Section 11(c) of the Act provides as follows:

> Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as

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* As amended November 9, 1943. 8 F. R. 15362.

necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

Now, therefore, the following regulations are hereby issued. These regulations shall become effective on March [fol. 203] 31, 1944 * and shall be in force and effect until repealed or modified by regulations hereafter made and published.

Section 633.101—Definitions

As used in these regulations, the term "industrial home work" means the production by any person in or about a home, apartment, tenement, or room in a residential establishment, for an employer, of goods from material furnished directly by or indirectly for such employer.

"The Embroideries Industry" as used herein means:

The production of all kinds of hand and machine-made embroideries and ornamental stitchings, including, but not by way of limitation, tucking, shirring, smocking, hemstitching, hand rolling, fagoting, Bonnaz embroidery, appliqueing, crochet beading, hand drawing, machine drawing, rhinestone trimming, sequin trimming, spangle trimming, eyelets, passementeric, pleating, the application of rhinestones and nailheads, stamping and perforating of designs, Schiffli emboidery and laces, burnt-out laces and velvets, Swiss hand-machine embroidery, thread splitting, embroidery thread cutting, scallop cutting, lace cutting, lace making-up, making-up of embroidered yard goods, straight cutting of embroidery and cutting out of embroidery, embroidery trimmings, bindings (not made in textile establishments), pipings and emblems; *provided, however*, that (1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or other article, and (2) the manu- [fol. 204] facture of covered buttons and buckles, shall not be included.

Section 633.102—Application on Official Forms

Certificates authorizing the employment of industrial home workers in the Embroideries Industry may be issued

* As amended November 9, 1943. 8 F. R. 15362.

upon the following terms and conditions upon application therefor on forms provided by the Wage and Hour Division. Such forms shall be signed by both the home worker and the employer.

Section 633.103—Terms and Conditions for the Issuance of Certificates

If the application is in proper form and sets forth facts showing that the worker—

(1) (a) is unable to adjust to factory work because of age or physical or mental disability; or

(b) is unable to leave home because his presence is required to care for an invalid in the home; *and*

(2) (a) was engaged in industrial home work in the Industry, as defined, prior to November 2, 1942 (except that if this requirement shall result in unusual hardship to the individual home worker it shall not be applied); or

(b) is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or of a Sheltered Work Shop, as defined in section 525.1, Part 525, Chapter V, Title 29, Code of Federal Regulations,

[fol. 205] a certificate may be issued authorizing the applicant employer to employ the worker in industrial home work in the Embroideries Industry.

No home worker shall perform industrial home work for more than one employer in the Embroideries Industry, but home work employment in another industry shall not be a bar to the issuance of a certificate for the Embroideries Industry.

Section 633.104—Investigation May Be Ordered to Determine Whether the Facts Justify the Issuance of Certificate

An investigation may be ordered in any case to obtain additional data or facts. A medical examination of the worker or invalid may be ordered or a certification of facts concerning eligibility for the certificate by designated officers of the State or Federal Government may be required.

Section 633.105—Termination of Certificates

Certificates shall be valid under the terms set forth in the certificate for a period of not more than 12 months from the date of issuance or such shorter period as may be fixed in the certificate. Application for renewal of any certificate shall be filed in the same manner as an original application under these regulations.

Section 633.106—Revocation and Cancellation

Any certificate may be revoked for cause at any time. Violation of any provision of the Fair Labor Standards Act shall be sufficient grounds for revocation of all certificates issued to an employer, in which event no certifi- [fol. 206] cates shall be issued to the offending employer for a period of one year. In any proceedings for the revocation or cancellation of a certificate, interested parties shall be provided an opportunity to be heard.

Section 633.107—Preservation of Certificate

A copy of the certificate shall be sent to the home worker, who shall keep such certificate on the premises on which the work is performed.

A copy of the certificate shall be sent to the employer, who shall keep this copy on file in the same place at which the worker's employment records are maintained.

Section 633.108—Records and Reports

The issuance of a certificate shall not relieve the employer of the duty of maintaining the records required by Regulations, Part 516, and failure to keep such records shall be sufficient cause for the cancellation of certificates issued to such an employer.

Each employer of industrial home workers in the Embroideries Industry shall submit to the regional office of the Wage and Hour Division for the region in which his place of business is located on April 1 and October 1 of each year, the homework handbooks of each employee employed by him during the preceding six month period in industrial home work in the Embroideries Industry. This report shall also include a list of the names, addresses, and certificate numbers of home workers for whom home work certificates have been obtained, but who were not employed

in industrial home work in the Embroideries Industry during such period.

[fol. 207] Section 633.109—Wage Rates

Wages at a rate of not less than 40 cents per hour shall be paid by every employer to each of his home work employees except as subminimum employment of specific handicapped workers has been provided for by special certificates issued by the Wage and Hour Division pursuant to Regulations, Parts 524 and 525. All hours worked in excess of 40 in any workweek shall be compensated for at one and one-half times the regular rate of pay.

Section 633.110—Delegation of Authority to Grant, Deny or Cancel a Certificate

The Administrator may from time to time designate and appoint members of his staff or State agencies as his authorized representatives with full power and authority to grant, deny or cancel home work certificates.

Section 633.111—Petition for Review

Any person aggrieved by the action of an authorized representative of the Administrator in granting or denying a certificate may, within 15 days thereafter or within such additional time as the Administrator for cause shown may allow, file with the Administrator a petition for review of the action of such representative praying for such relief as is desired. Such petition for review, if duly filed, will be acted upon by the Administrator or an authorized representative of the Administrator who took no part in the proceeding being reviewed. All interested parties will be afforded an opportunity to present their views in support of or in opposition to the matters prayed for in the petition.

[fol. 208] Section 633.112—Petition for Amendment of Regulations

Any person wishing a revision of any of the terms of the foregoing regulations may submit in writing to the Administrator a petition setting forth the changes desired and reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable

cause for amendment of the rules and regulations is set forth, the Administrator will either schedule a hearing with due notice to interested persons or will make other provisions to afford interested persons opportunity to present their views in support of or in opposition to the proposed changes. The foregoing sections are issued pursuant to Section 633.3, of the Regulations of the Wage and Hour Division and Sections 8(f) and 11(c) of the Fair Labor Standards Act of 1938.

[fol. 52] Extract From Testimony of Solomon S. Friedman.
S. M. 1339-1341

The Witness: Under the same conditions as outlined in my testimony of November 11, additional questionnaires from homeworkers were received by me, and I am now in a position to state for the record the recapitulation of 297 of these statements. Of the 297, 135 were sworn to before a notary public; 162 are unsworn statements. The recapitulation shows the following:

288 homeworkers of the 297 stated their ages, and the average age for the 288 homeworkers, is 42 years minus; of the 297 homeworkers, 92 were engaged in crochet beading; 132 were engaged in hand embroidery; and 73 were engaged in other handcrafts in the embroidery industry.

The average experience of the 297 homeworkers was 10 years. Their average weekly earnings during the season was $14.50 per week. Going back for a moment to the ages of these 288 homeworkers, the recapitulation shows that 55 of these women were 50 years and over; 54 of them were between the ages of 45 to 50; 47 of them were between the ages of 40 to 45. In other words, 156 women of the 288 were either 40 years or over, and 132 of the 288 were under 40 years of age.

259 of the women stated they were married; 37 were unmarried. Of the 259 who were married, 21 were either widows or were separated from their husbands or were divorced from them. 204 of the husbands are employed; 33 are not employed. The average annual earnings of the husbands who are employed is $1,240 a year.

For 208 homeworkers who had children in their families, the average number of children per family is 2 plus. Of the 208 families referred to, 113 had 2 or less children; 95 had three or more. Of the 95 families just referred to, 28 of them had 4 or more children and 14 of them had 5 or more children. 36 of the women stated that they supported a father or mother, or father-in-law, or mother-in-law.

[fol. 53] In answer to the question as to whether the homeworker could work in a factory if she were unable to get homework, of the 297, 10 of them answered, yes; 287 answered, no. For their reasons, of the 287, 164 stated it was because of children; 16 stated that it was because of husbands who were ill and had to be taken care of; 17 stated it

was because of parents; 96 gave other reasons which could not be broken down into separate classifications.

In answer to the question as to whether the homeworker was familiar with the Wage and Hour Law and the fact that it guaranteed a minimum wage for each hour put in on homework irrespective of the piece-work rate, 160 stated that they were so familiar with the act; 101 said that they were not acquainted with the act in that particular; and 36 made no answer at all.

Examiner Campbell: Does that complete your recapitulation?

The Witness: That is correct sir. At this time, so that the record will be complete, I again offer the 297 statements referred as an exhibit on behalf of the National Embroidery Association.

Examiner Campbell: For the reasons explained yesterday, Mr. Friedman, we will decline to accept those for the record.

Mr. Lieberman: Mr. Examiner, may the record further show that according to the testimony of this witness, 132 of these very answers were not sworn to.

The Witness: 162.

Mr. Lieberman: 162.

The Witness: That is correct; and may the record show, sir, that I except to your ruling? Okay, Mr. Lieberman.

Mr. Lieberman: Before I proceed with the cross examination, may the record show that my questioning of the witness shall in no way be interpreted as any attempt on my part to reflect either upon the credibility or upon the integrity of the witness.

[fol. 54] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1943

Nos. 361-362-363

(Argued May 23, 1944 Decided June 27, 1944)

JOSEPHINE GUISEPPI, et al., Petitioners,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent

MILDRED MARETZO, et al., Petitioners,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent

GEMSCO, INC., et al., Petitioners

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent

[fol. 55] Before: L. Hand, Swan and Frank, Circuit Judges.

Petitions to review and set aside a portion of a wage order of the Wage and Hour Administrator. Petitions denied.

Douglas B. Maggs, Archibald Cox, Louis Sherman, Irving Rozen, Kenneth Meiklejohn and Faye Blackburn, for respondent.

Landau & Friedman (Solomon S. Friedman, of counsel) for petitioners, Josephine Guiseppi, et al.

Brower, Brill & Tompkins (Ilo Orleans and Coleman Gangel, of counsel) for petitioners, Mildred Maretzo, et al.

Weisman, Quinn, Allan & Spett (Samuel S. Allan and Seymour D. Altmark, of counsel) for petitioners Gemsco, Inc., et al.

Kraushaar & Kraushaar (Meyer Kraushaar, of counsel) for Lidz Brothers, Inc., Amicus Curiae.

Erwin Feldman, for Harlem-Adler Co., Inc., and Schner-Block Company, Amicus Curiae.

The wage order in question here, issued pursuant to §8 of the Fair Labor Standards Act (29 U. S. C. A. 201, *et seq.*), relates to the embroideries industry. On June 6, 1942, the Administrator appointed an industry committee No. 45 [fol. 56] "to investigate conditions in the industry and recommend to the Administrator minimum wage rates for all employees thereof" who are subject to the Act. The industry committee unanimously recommended the establishment of a minimum wage rate of 40 cents an hour for all employees in the industry and transmitted to the Administrator its report and recommendation. A notice of hearing was published in the Federal Register on September 16, 1942, which stated that evidence would be received on the questions: "1. Whether the recommendations of Industry Committee No. 45 should be approved or disapproved; 2. In the event an order is issued approving the recommendations, what, if any, prohibition, restriction or regulation of home work in this industry is necessary to carry out the purpose of such order, to prevent the circumvention or evasion thereof and to safeguard the minimum wage rates established therein."

The public hearing was held in November 1942. All interested parties were given an opportunity to be heard. Extensive testimony and many exhibits were received in evidence. On August 21, 1943, the Administrator issued his findings and opinion based on the evidence adduced at the hearing and on the same day, issued the wage order under review.

The chief term of the Wage Order for the Embroideries Industry is a provision establishing the rate of 40 cents an hour as the minimum wage to be paid by an employer under Section 6 of the Fair Labor Standards Act to each of his employees in the industry who is engaged in interstate commerce or in the production of goods for interstate commerce. The order also contains a definition of the Embroideries Industry. In addition the wage order provides:

"No work in the Embroideries Industry, as defined herein, shall be done in or about a home, apartment, tenement, or room in a residential establishment after November 15,

[fol. 57] 1943,[1] except by such persons as have obtained special home work certificates issued pursuant to applicable regulations of the Wage and Hour Division, authorizing industrial home work by a worker who (1) (a) Is unable to adjust to factory work because of age or physical or mental disability; or (b) Is unable to leave home because his presence is required to care for an invalid in the home; and (2) (a) Was engaged in industrial home work in the Industry, as defined, prior to November 2, 1942 (except that if this requirement shall result in unusual hardship to the individual homeworker it shall not be applied); or (b) Is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or of a Sheltered Work Shop, as defined in §525.1, Part 525, Chapter V, Title 29, Code of Federal Regulations."

The Administrator's findings on the subject of home work may be summarized as follows:

Home work in the embroideries industry is distributed to the workers directly by regular embroidery manufacturers or contractors who have their own shops, and indirectly through contract shops or distributors. The number of home worker employees per firm varies greatly; in New York the average per firm is 26 workers; in Pennsylvania, the average is nine. The work done at home does not differ from that done by other employees in factories.

In the years just prior to the administrative hearing, the practice of distributing embroidery work among homes was widespread in the industry. In June 1942, there were 18,500 factory workers. The number of employees, working at home, which cannot be ascertained precisely, ranged upwards from 8,500—35 per cent of the total. Some 70 per cent of the home workers were employed by New York firms; [fol. 58] 17 per cent by employers in New Jersey, and the rest were scattered throughout other States. The proportion of home worker employees to all employees, however, has not always been so high; for example, N. R. A. codes for four branches of the industry prohibited home work and thus must have concentrated a greater proportion of the work in the factories.

Experience under the Fair Labor Standards Act and under earlier wage orders issued pursuant to it, has dem-

[1] The effective date was postponed to May 15, 1944.

onstrated that the practice of distributing work to employees in their homes result in "wholesale volation of the minimum wage and record keeping requirements of the Act and regulations" and furnishes "a ready means of circumventing or evading the minimum wage order." This was demonstrated by inspections made of 222 firms in the Industry during the period between May 1, 1941, and May 1, 1942. Only 3 per cent of those firms were found to be in compliance.

Although special record keeping regulations had been issued providing for the use of handbooks in which employees could record their hours of work and earnings, it was found that 95 per cent of the employers had not kept records at all or had kept inadequate or inaccurate records. Forty-six per cent had not used handbooks at all. Many others had failed to keep proper records of home workers' hours, a basic requisite in determining compliance. In addition, there was evidence that records were being falsified; for example, by recording as hours worked not the actual number, but a fictitious figure determined by dividing the weekly earnings by the prevailing minimum wage.

In the absence of adequate records, it was difficult to obtain adequate data showing the extent of violations of prior minimum wage orders as distinguished from record keeping violations, but it is clear that they were widespread. A survey conducted by the Economics Branch of the Wage [fol. 59] and Hour Division showed that even in the eighteen months boom period between January 1941 and July 1942, more than 60 per cent of the home workers were paid less than 37½ cents an hour, in violation of the wage order then applicable. Approximately a third of the home workers received less than 25 cents an hour; one-sixth, less than 20 cents and in some instances—1.8 per cent of the total —the employers did not pay even 10 cents an hour for the work. A survey by the New York State Department of Labor confirmed these findings of the Wage and Hour Division. The violations extended to all branches and operations in the industry.

The apparent impossibility of enforcing a minimum wage among home workers is due in large part, of course, to the opportunities for evasion which the practice of employing home workers affords to the unscrupulous seeking unfair competitive advantages. The problem also arises,

however, from the difficulties inherent in the varied circumstances under which home work is performed and the lack of supervision which make it impossible for well-intentioned employers as well as government inspectors to obtain accurate knowledge as to how home workers spend their time, under what conditions they work, and what help they secure from other persons. A number of factors inseparable from the practice itself, contribute to the problem: Payment is on a piece work basis and it is impossible to fix rates for home workers which will yield the least skilled worker the minimum without paying the skilled worker an uneconomical wage. The industry is dependent upon novel variations in designs and for each design a new rate must be set. The general rule is to time a sample worker in the factory and to apply the rate thus obtained to the same work when the operation is done in a home. Some employers merely fix an arbitrary rate. Inevitably, the actual hourly earnings of the home workers vary widely [fol. 60] from the standard and among themselves. Home work conditions are not subject to control or standardization as are those in a factory; yet the condition under which a task is done governs in large part the speed with which it is accomplished. The home workers themselves vary greatly in skill, productivity, and efficiency; styles and operations vary greatly among home workers whereas in a factory the most efficient techniques can be singled out and taught to all. As a result "piece rates cannot practically be set so as to reflect accurately the hours of work of the home worker or secure reliably a definite hourly wage."

The problem would not be solved by requiring that "make up" be paid to the slower workers because it is virtually impossible to determine their hours of work. The lack of employer supervision, the participation of other persons in picking up and delivering work (which is work time), the frequent participation of other members of the family in doing the home worker's work, as well as the intermittent character of home work itself all make it a practical impossibility for either employer or employee to keep an accurate check of the time worked and the wages due to make up the established minimum. One home worker, for example, who believed that she had been paid the applicable minimum and was called by her employer to testify against the proposal to restrict home work, was found to have

earned considerable below the minimum. Furthermore, fear of loss of employment induces many home workers to refrain from reporting time worked in excess of the time which the employer indicates should be required. For these reasons the regulation of home work, even if it included further regulation of record-keeping practices or governmental establishment of piece rates, would not be adequate to secure effective enforcement of the minimum wage. But the problem is not simply to secure payment of the minimum wage rate for the home workers alone. If the 40 cent minimum were not paid to the home workers, [fol. 61] competitive disadvantage would result to employers of factory labor, thereby undermining the wage structure throughout the industry and thwarting the purposes of the order and the Act. "The evidence adduced at the hearing conclusively shows that large proportions of home work employees in the Embroideries Industry and in all of its branches are paid less than the applicable minimum. It is apparent that if some employers are allowed to utilize home workers at subminimum wage scales, other employers compelled to pay a 40-cent minimum will be placed at a competitive disadvantage.

Experience in comparable industries has shown that the transfer of work from home to factory can be accomplished without hardship to employees or their employers. After home work was prohibited in the men's neckwear and men's clothing industries by regulations issued under the National Industrial Recovery Act, the Department of Labor conducted a survey which revealed that probably 80 per cent of the home workers were thereafter employed in factories and only one firm ceased business. In the men's clothing industry, 94 per cent of the home workers transferred to factory operation. The home workers who shifted to the factory found little trouble in self-adjustment irrespective of age, and output improved in quantity and quality. Hourly earnings increased as much as 200 per cent.

Similar experience has been reported in the administration of laws restricting the employment of home workers in Rhode Island, New Jersey, and New York. In Rhode Island, for example, the Department of Labor in 1938 issued a wage order establishing minimum wages for women and minors in the wearing apparel and accessories industry and, in order to safeguard the minimum, the wage order

included a term prohibiting industrial home work. The wage order covered "embroidery operations" performed on underwear, handkerchiefs, infants' and children's cloth-
[fol. 62] ing, women's dresses and gift novelties. The manufacturers of these articles experienced no difficulty in bringing home workers into the factories and the Rhode Island industry has continued to grow.

Conditions in the embroideries industry generally and in each of its branches also indicate specifically that the members of the industry will not have any great difficulties in adjusting their methods of doing business to the prohibition of industrial home work, and that they will not suffer undue hardship or competitive disadvantage. Referring to the contention of military embroiderers that there will be a decrease of production in their part of the industry, the Administrator found "The evidence in the record not only does not support any such contention, but indicates rather that production of these types of embroidery may be stimulated and increased."

From the foregoing findings and from all the evidence, the Administrator concluded as follows: "It is my finding, after due consideration of the low wage rates paid home workers and the competitive relationship among various types of the embroidery operations that it is necessary to provide terms and conditions with respect to the restriction of home work to carry out the purposes of the minimum wage order for the Industry, to prevent the circumvention or evasion thereof and to safeguard the 40-cent hourly minimum established therein * * *

"I have considered all the evidence relating to adjustment to the factory system of manufacture and find that this adjustment can reasonably be made without undue hardship upon home workers or home work employees * * * Prohibition of home work will not prohibit any type of work or occupation but will merely compel the transfer of work and occupations formerly carried on in the homes to the factory where the workers may be adequately supervised and their payment in accordance with the mini-
[fol. 63] mum wage order for the industry guaranteed. The possibilities of adjustment to a prohibition of home work which are disclosed by the record furnish ample assurance that no substantial curtailment of operation will

result. All of the operations in question are carried on in the factory as well as in the home."

In his opinion the Administrator said: "This proceeding is not concerned with the question whether home work is desirable or undesirable from a social point of view or as a form of economic organization. It is concerned solely with whether the home work system in the Embroideries Industry furnishes a means of circumventing or evading a wage order putting into effect the minimum wage recommendation of Industry Committee No. 45 so that it is necessary to provide in the wage order for its regulation, restriction or prohibition in order to carry out the purposes of such order and to safeguard the minimum wage rate established therein."

Petitioners have brought these review proceedings (consolidated for convenience) under § 10 of the Act, asking this court to review and set aside the provisions of the order prohibiting home work.

FRANK, *Circuit Judge:*

1. Our starting point is this: Without the prohibition of home-work contained in the order of the Administrator, the Act, in its application to this industry, will be unenforcible and will become virtually a dead letter. For so it was found as a fact by the Administrator, to whom the Act assigns its enforcement.[2] And the truth of his findings petitioners cannot here dispute, since they do not assert that those findings are not supported by substantial evi- [fol. 64] dence heard at the Administrator's hearing. At most, some of the petitioners cite a part of the evidence which is at variance with the findings but make no effort to show that there was not other contrary evidence of a substantial character. Moreover, as the printed supplements to their briefs, filed under our Rule 22, do not contain all the evidence, we must assume that, if we were to read all of it, the findings would be amply justified.[3] We

[3] Cf. *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 392, 398, 401; *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 125; *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282, 286; *Edward Hines Trustees* v. *U. S.*, 263 U. S. 143, 148.

[2] See the last sentence of § 11(a) and § 17.

must, too, take those findings "at their face value," although the Act did not require the Administrator to make them.[4] Indeed, assuming for the moment that, if necessary to make the statute effective, the Act conferred on him the power to issue such a regulation, there is a "presumption of the existence of facts justifying its * * * exercise."[5]

2. Notwithstanding that, on this record, petitioners are obliged to confess that the wage order will fail without the home work prohibition, they assert that the Administrator had no power to issue it. Faced with the provisions of §8(f)—which authorize him to insert in wage orders issued pursuant to §8 "such terms and conditions as" he "finds necessary to carry out the purposes of such orders, to prevent circumvention, and to safeguard minimum wage rates established therein"—petitioners say that, although on the facts here the elimination of home work is perhaps within that language, the regulation is so sweeping in its consequences that, had Congress intended to authorize it, the [fol. 65] statute would have dealt with that subject specifically as it does with child labor in §12. But in §12 Congress dealt with child labor as an independent matter, completely eliminating the employment of minors in the affected industries because of the socially and economically undesirable character of such employment and without regard to the effect on the wage rates and hours of adults. Here the Administrator has prohibited home work not at all on the ground of its inherent undesirability but solely as a means of preventing the circumvention or evasion of an order prescribing adult wage rates. Moreover, doubtless having in mind the provision of §8(b) that a wage order must "not substantially curtail employment in the industry," the Administrator has made a finding (which we must accept as true) that the home work regulation will have no such effect; the findings show that its consequences to the employers and employees is not as drastic as petitioners assert in their briefs. This is not a case, then, where an

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[4] See *Steuart & Bro. Inc.* v. *Bowles*, — U. S. — (May 22, 1944) where the Court so held as to findings of the Price Administrator when acting pursuant to a statute which did not require findings.

[5] *Pacific State Co.* v. *White*, 296 U. S. 176, 186.

effort is being made to utilize §8(f) as a subterfuge to achieve an independent end outside the scope of the Act; the regulation here is a means of accomplishing the purpose of an authorized wage order by stopping evasions of that order, and the Administrator in §8(f) was expressly empowered to use means of that kind.[6] Nor, in view of the Administrator's findings, can it be said that this is a case where the means are so disproportionate to the authorized end that they cease to be means except in form and in truth become an independent end not contemplated in the Act. [fol. 66] *Addison* v. *Holly Hill Fruit Products Co., Inc.*, —— U. S. —— (June 5, 1944) is not contrary to our conclusion. There the Court, interpreting one of the several specific exemptions from the Act, noted that those exemptions were "catalogued with particularity," and said: "Exemptions made in such detail preclude their enlargement by implication."

3. Petitioners, however, maintain that the amendment to the Act, in 1940, which added §6(a)(5), with its specific reference to homework in Puerto Rico and the Virgin Islands, shows that Congress denied power elsewhere with respect to that subject. That argument cannot stand up; for the legislative history of §6(a)(5) discloses that it was added to meet the peculiar economic conditions existing in Puerto Rico and the Virgin Islands; it might better be argued, indeed that Congress found it necessary to amend the Act by adding that subsection precisely in order to limit the exercise of that power theretofore existing, before that amendment, with respect to those and all other areas covered by the Act.

4. Petitioners further contend that the legislative history of §8(f) demonstrates that Congress did not intend thereby to delegate any authority concerning homework. That history, briefly told, is as follows: The Senate bill, as re-

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[6] Accordingly we see nothing in the suggestion that the regulation is invalid because the Administrator did not find that it would directly serve the declared policy of the Act set forth in §2. It is enough that it will do so indirectly, i. e., that it is a necessary adjunct to enforcement of the wage order authorized by the Act, which order, in turn, is issued to achieve the declared purpose contained in §2.

ported by the Committee in charge, provides that all minimum wage rates and wage differentials should be established by a Board through the issuance of labor standard orders. With respect to such orders the Board was given powers in a provision substantially the same as §8(f) of the Act except that after the word "conditions" there was a parenthetical clause "(including the restriction or prohibition of such acts or practices)." On the floor, an amendment was adopted, without comment or objection, inserting [fol. 67] in the parenthesis the words "industrial homework." The original House bill, which was much the same as the Senate bill, included this same provision containing the matter in parenthesis. This bill, however, was recommitted. The House Committee then reported a new bill which contained no provision for wage orders but established fixed minimum wages, and included no provision resembling §8(f) i. e., for the prevention of circumvention or evasion. This substitute bill (with modifications not relevant here) passed the House. In the Conference Committee a compromise was made between the Senate and House bills which resulted in the present Act, with §6 containing fixed wage rates subject to acceleration as provided in §8. Neither the Conference Report nor the subsequent debates discussed any reasons for omitting the matter in the parenthesis from the provision which now appears as §8(f). We see nothing in that ambiguous history disclosing an intention to eliminate from §8(f) the power to prohibit home work if that prohibition is necessary to prevent circumvention or evasions.

Cudahy Packing Company v. *Holland*, 315 U. S. 357, is not in point. True, there, the Court referred to the fact that authority to delegate the subpoena power, expressly granted in the Senate bill, had been rejected by the Conference Committee; but, as the Court pointed out, the significance of that fact was that the Conference Committee substituted a provision giving the Administrator the subpoena power conferred upon the Federal Trade Commission, and that agency, and other agencies upon which like power had been conferred, had never theretofore construed it to include the right to delegate the issuance of subpoenas; the Court also said that, if the right to delegate the subpoena power were implied, then necessarily there would be a similar implication as to all the functions assigned by the

statute to the Administrator, a conclusion which the important nature of several of those functions precluded.

[fol. 68] 5. But petitioners assert that, even granting that §8(f), taken alone, would include the power to issue the home work order, other provisions of the Act show that Congress could not have intended to authorize so extensive a regulation. The argument runs thus: §8(f), by its terms, restricts the Administrator's authority to that of annexing "terms and conditions" to "orders" issued under §8; no similar power is given him as to wage rates automatically established under §6 when no §8 order is operative; by §8(c), all orders (except in unusual circumstances) expire in October 1945. If, then, say petitioners, §8(f) were construed to authorize the homework prohibition here, that prohibition would expire in 1945. It is unreasonable to believe, argue petitioners, that Congress intended that so extensive a prohibition should be in effect for a period of at most seven years (in this case a little more than a year), that home work could be banned during but a small span and not for the long future. Accordingly, petitioners urge, as §8(f) applies only to orders, it must, for the sake of consistency, be construed not to include so extensive a power.

That argument proves too much. It cannot stop with eliminating from §8(f) the authority to forbid home work. Pushed to its logical conclusion, this contention says that any regulation under that subsection lacks validity unless the statute expressly authorizes a similar regulation concerning all wage rates; petitioners would thus have us read §8(f) out of the Act. As, of course, petitioners do not venture to go that far, their "consistency" contention comes to this: §8(f) must be narrowly interpreted so as not to confer authority of any importance; in other words, the Administrator may make a regulation to prevent minor evasions of a wage order, but he is powerless to prevent major evasions which, as here, will gut the order. Such an interpretation—which flies in the face of the wording of §8(f), rendering it virtually meaningless, making practi-[fol. 69]cally useless many a wage order, thus all but destroying §8—ascribes to Congress an unreasonable intention.

Were it necessary for us here to pass on the matter, we would be obliged to consider whether consistency and reasonableness require that §8(f) be interpreted so as to apply

to all wage rates or whether, quite aside from §8(f), the Administrator has the implied power to issue regulations necessary to protect all wage rates from evasions.[7] But the power of the Administrator to safeguard wage rates when no wage order is in effect is an issue not now before us. Since in the instant case there is such a wage order, it is not our present concern whether or not the Act is deficient in its protection of wage rates not established by an order. If there is such a flaw, it is the function of Congress to deal with it. The legislative process is inherently such that, on occasions, the applications of a statute in practice disclose inconsistencies. While the literal meaning of a statute must yield to its evident purpose or policy, yet where a statutory provision accords with that purpose, the courts should seldom enlarge that provision, in the interest of symmetry or uniformity, in order to supply an omission.[8] In interpreting another section of this very Act, the Supreme Court said the other day: "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one [fol. 70] sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive."[9] If, then, it were true that, in working out the compromise between the House and Senate bills, Congress, by literally restricting the provisions of §8(f) to orders, inconsistently left other wage rates subject to

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[7] See, e. g., *Edward's Lessee* v. *Darby*, 12 Wheat. 206, 208; *U. S.* v. *Madantel*, 7 Pet. 1, 14; *Boske* v. *Commingore*, 177 U. S. 459, 469-470; *Fed. Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, 555-559; *Alaska S. S. Co.* v. *U. S.* 290 U. S. 256; *Phelps-Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194-196; *Morgenthau, Implied Regulatory Powers in Administrative Law*, 23 Ia. 575 (1943); cf. *Osborn* v. *Bank*, 9 Wheat. 738, 865; *Solvents Corp. Mellon*, 277 F. 548, 550 (App. D. C.); *Hepburn v. Griswold*, 8 Wall. 603, 613.

[8] See, e. g., *McFeely* v. *Commissioner*, 296 U. S. 102, 111; *U. S.* v. *Union Pacific R. R. Co.*, 91 U. S. 72, 85; L. Hand, *J.*, in *N. Y. Life Ins. Co.* v. *Bowers*, 39 F. (2d) 556, 559 (C. C. A. 2), aff'd 283 U. S. 242.

[9] *Addison* v. *Holly Products, Inc.*, —— U. S. —— (June 5, 1944).

evasion, that would be no reason for holding that, as to orders, Congress did not mean what it said.

6. We cannot agree with the suggestion that Congress, if it had intended the Administrator to regulate home work, would have required him first to consult the industry committees or to hold hearings. For §§ 7(c) and 13 empower him to take action having more extensive consequences without such consultation or hearings.

We also consider untenable the suggestion that the home work regulation is invalid because the statute did not expressly require a hearing as a condition precedent to its issuance. Aside from the fact that here such a hearing was in fact held, the short answer is that the Constitution does not require a hearing before the promulgation of such a regulation. *Bowles* v. *Willingham*, — U. S. — (March 27, 1944); *Phillips* v. *Commissioner*, 283 U. S. 589, 596-597; *Bi-Metallic Investment Co.* v. *State Board*, 239 U. S. 441.[10]

7. We reject the argument that stricter enforcement or some other measure would meet the problem without the [fol. 71] need for prohibiting home work, for the Administrator has made express findings to the contrary.[11]

8. Nor is there, we think, anything to the point that the Administrator had made an unreasonable discriminatory classification by his exemptions from the prohibition. The Fifth Amendment contains no "equal protection" clause.[12] Moreover, it is by no means clear that the exemption would be an invalid classification even under the Fourteenth Amendment.[13]

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[10] When, pursuant to statute, courts make rules governing practice and procedure, they are not required, as condition precedent, to hold hearings. The question of the validity of those rules can be raised in specific cases arising under them.

[11] The contention of *Gemsco, et al.* (made half-heartedly before us) that manufacturers of military and naval insignia should not have been (or are not) included in the definition of this industry, is met by the Administrator's contrary findings.

[12] Cf. *Helvering* v. *Lerner Stores*, 314 U. S. 463, 468.

[13] Cf. *Queensboro Farms* v. *Wickard*, 137 F. (2d) 969, 977-978 (C. C. A. 2).

9. Equally unsound is the argument that the prohibition of home work violates due process. It is perhaps sufficient to note that, to support this argument, petitioners rely heavily on the remarks of Field, J., concerning liberty of contract in his concurring opinion in *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 757. Surely the extreme views there expressed are no longer authoritative.[14]

10. Finally we come to the contention that, if the statute confers the asserted authority on the Administrator, then it unconstitutionally delegates legislative power. The question raised by that contention is not new. More than two thousand years ago, a profound student of government, [fol. 72] from whom we derive the concept of a "government of laws, and not of men,"[15] explained the inescapability of some delegation by legislators. The "rule of law," he said, "is preferable to that of any individual" and "he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men," whereas "the law is reason unaffected by desire." But, sagely, he noted that "there may indeed be cases in which the law seems unable to determine," and asked "but in such cases can a man?" He answered that "the law trains officers for this express purpose, and appoints them to determine matters which are left undecided by it, to the best of their judgment. Further it permits them to make any amendment of the existing laws which experience suggests * * * And at this day there are magistrates, for example judges, who have authority to decide matters which the law is unable to determine * * *" He added that "no one

[14] See, e. g., *U. S.* v. *Darby*, 312 U. S. 100; *Jones & Laughlin*, 301 U. S. 1; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177; *Olsen* v. *Nebraska*, 313 U. S. 236; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; cf. *Hume* v. *Moore-McCormack Lines*, 121 F. (2d) 336, 339-340.

[15] That phrase came into English thinking about government through Harrington's *Oceana* (1656) 2-29; Harrington there acknowledged borrowing it from Aristotle. John Adams, in turn, borrowing the phrase from Harrington who much influenced him, wrote it into the Bill of Rights of the Massachusetts Constitution of 1780.

doubts that the law would command and decide in the best manner whenever it could. But some things can, and others cannot, be comprehended under the law, and this is the origin of the vexed question whether the best law or the best man should rule. For matters of detail about which men deliberate cannot be included in legislation. Nor does anyone deny that the decisions of such matters must be left to man * * * "[15c]

[15a] Aristotle, *Politics*, Bk. III, Ch. 16, 1287a, 24 et seq. He also spoke of "filling up the gaps which the law is obliged to leave."

And in his remarks elsewhere on "equity," he said that "all law is couched in general terms, but there are some cases upon which it is impossible to pronounce correctly in general terms. Accordingly, where a general statement is necessary, but such a statement cannot be correct, the law embraces the majority of cases, although it does not ignore the element of error. Nor is it the less correct on this account; for the error lies not in the law, nor in the legislature, but in the nature of the case. For it is plainly impossible to pronounce with complete accuracy upon such a subject matter as human action. Wherever then the terms of the law are general, but the particular case is an exception to the general law, it is right, where the legislator's rule is inadequate or erroneous in virtue of its generality, to rectify the defect which the legislator himself, if he were present, and had he known it, would have rectified in legislating * * * This is in fact the nature of the equitable; it is rectification of law where it fails through generality * * * For where the thing to be measured is indefinite the rule must be indefinite * * *" *Nicomachean Ethics*, Bk. V, Ch. 10, 1137b, 13-31. "The equitable seems to be just and equity is a kind of justice, but goes beyond the written law. This margin is left by legislators, sometimes voluntarily, sometimes involuntary; involuntary when the point escapes notice, voluntary when they are unable to lay down a definition, and yet it is necessary to lay down an absolute rule; also in cases where inexperience makes it hard to define * * *; for life would not be long enough for a person to enumerate the cases." *Rhetoric*, Bk. I, ch. 13.

By a "government of men" Aristotle apparently meant a government in which a specific judgment or decree affecting a specific person is rendered by the legislator or legisla-

[fol. 73] Without mentioning that author, our Supreme Court has often echoed his words. In 1904, it said,[16] "Congress legislated on the subject as far as was reasonably [fol. 74] practicable, and from the necessities of the case, was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted." In 1934, it said, "Undoubtedly, legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress resources of flexibility and practicability * * * Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which, in many circumstances, calling for its exertion, would be a futility."[17]

True, in the case last quoted and in another decided about the same time,[18] it was held that the delegations there involved were so lacking in adequate standards, so unrestrained, as to be unconstitutional. But, in the light of many subsequent decisions, those two cases must now be considered exceptional, restricted to their particular or very similar facts. The standard in § 8(f), coupled with the pro-

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tive body. Curiously, some of our Congressional "private bill" legislation would come within that criticized category.

Aristotle's point of view reappeared in a New York Times' editorial of December 15, 1943: "It is the proper function of Congress to frame laws and general policies, to delegate powers wherever detailed control is necessary, and to see that laws are properly administered. But it is not the function of Congress itself to administer the law. It is not its business to meddle in specific decisions. Once it does so * * * it will find itself overwhelmed with administrative details that it is not remotely organized to attend to * * * Such detailed meddling can only * * * lead towards administrative chaos."

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[16] *Buttfield* v. *Stranahan*, 192 U. S. 470, 496.

[17] *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421 (check).

[18] *Schechter Corp.* v. *U. S.*, 295 U. S. 495.

visions of the other provisions of § 8 and with § 2, amply meet the test of adequacy of standards according to recent Supreme Court decisions.[19]

Petitioners scarcely try to distinguish those cases. They fall back on a rigid conception of the "separation of powers" [fol. 75] doctrine. Such an inflexible conception finds no justification in English or American history,[20] and cannot

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[19] See, e. g., *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *Yackus* v. *U. S.*, — U. S. — (March 27, 1944); *Bowles* v. *Willingham*, — U. S. — (March 27, 1944).

[20] See Holdsworth, 10 *History of English Law*, 720, for the grave inaccuracy of Montesquieu's description of the English government of the 18th century as one in which the three functions were clearly separated. "It is curious that some political theorists should have seen their favorite ideal, a complete separation of administration from judicature, realized in England; in England of all places in the world, where the two have for ages been inextricably blended"; Maitland, 3 *Collected Papers* (1911) 478; cf. Holmes, *Collected Legal Papers* (1920) 251, 263. That Montesquieu's idea, as to the judicial function was apparently not that adopted in his own country, see Franklin, *The Judiciary State*, 2 Nat. Lawyers' Guild Q. (1940) 244, 249-250. For "the conviction that the courts should not interfere with administrative action became the basic postulate of the French version of the separation of powers * * *" Seagle, *The Quest For Law* (1941) 331.

Incorrect also is the notion that Coke, in the 17th century, espoused the "separation" doctrine. His attacks on the High Commission, an ecclesiastical court, and on other governmental agencies, were based on his contention that they were exercising powers not conferred on them by Parliament, never that Parliament could not do so or that there was anything inherently bad in a grant of combined judicial and executive or legislative functions. He sat in both the Privy Council and the Star Chamber which each exercised combined judicial and administrative powers of an extensive character. Not only did he not protest against that fusion of powers in those bodies but late in life described the Star Chamber as "the most honorable court (our

[fol. 76] be realized in practice.[21] As Holmes, J., said in his dissenting opinion in *Spinger* v. *Philippine Islands*, 277 U. S. 189, 211: "It does not seem to need argument that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires."[22]

Parliament excepted) that exists in the Christian world." 4 *Institutes* 65.

In this country, the Articles of Confederation made no provision for separating the three powers. And the discussions of Madison and Hamilton in The Federalist (Nos. 38, 47, 48 and 66) show not only that the constitutions of most American States after Independence by no means adhered rigidly to the tripartite separation but also that the federal Constitution was not intended to do so. See also, Nettels, *The Roots of American Civilization* (1938) 666; Merriam, *American Political Theories* (1903) Chapters II and III.

Jefferson came to have a poor opinion of Montesquieu. And in 1816 he said of the Virginia country courts, which performed such non-judicial functions as supervising schools, levying taxes and appointing sheriffs, "I acknowledge the value of this institution; it is in truth our principal executive and judiciary." 5 *Works* (Washington ed., 1853) 539; 7, ibid, 18.

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[21] Cf. Story, *The Constitution* (1833) Chapter VII.

The Supreme Court, as early as 1825, held that Congress may delegate to the Supreme Court a power which the Court regarded as legislative, i. e., the power to make or alter rules of procedure. *Wayman* v. *Southard*, 10 Wheat. 1.

[22] About a half century ago, William Bondy (now Judge Bondy) in his brilliant work, *Separation of Governmental Powers*, 5 *Columbia Studies in History, Economics and Public Law*, No. 2 (1896), illuminated this subject. He showed that the specific allocations of functions in the Constitution were determined by practical rather than theoretical considerations. He calls "administrative" any powers not explicitly allocated, although in their nature legislative, executive or judicial. Such powers, he suggests, Congress

As, in spite of Supreme Court decisions which should put the matter at rest, we still frequently hear arguments which assume an inherent infirmity in delegation of rule-making to administrative officers, it seems worthwhile to analyze the problem somewhat more in detail.

In the history of this country, subordinate legislative powers were delegated at an early day, both by our state [fol. 77] legislatures and Congress.[23] What is new for us

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may itself exercise or, by statute, assign either to the executive or judicial branches or to "administrative" officials. All that the "separation" doctrine means, he says, is this: If the Constitution expressly assigns a power to any one branch, the others may not interfere with its proper exercise; the courts, however, may, in a "case or controversy," determine whether a power has been properly exercised (except as to certain "political" matters and as to the exercise of certain powers by the Chief Executive.)

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[23] In 1787, the Vermont legislature assigned to the officials of the several towns of that state the task of granting rights to operate ferries and of regulating the grantees' "prices" and "profits," (such regulations "to be varied from time to time as occasion shall require") because, so the legislation said, "it has been found by experience that great advantage has been taken by ferrymen demanding unreasonable prices for their services" and "this Assembly cannot so well distinguish between the several rivers, and the several parts of said river, or lake, on account of distance, swiftness of water, number of travellers, etc." The state insurance departments are, we are told, "institutions with nearly a century of growth"; the state insurance commissioner "is partly executive, partly judicial and partly legislative"; no one can tell "when he stops legislating and begins to judge, or where he stops judging and begins to execute." Patterson, *The Insurance Commissioner in the United States* (1925) 5. In the federal government, administrative agencies dealing with the customs and with veterans were created in 1789, and the Patent Office had its start in 1790; eleven of the now-existing agencies had their beginnings between 1789 and the close of the Civil War; from 1865 to the end of the 19th century, six of the present boards were established; nine more date from the period

is the name "administrative law." [24] The writings of Goodnow and Freund introduced that name to the American legal profession several decades ago. But only in recent years has it come into extensive use. Even now, it finds no place in our conventional "digests." A new name, a novel label expressive of a new generalization, can have immense consequences. Emerson said, "Generalization is always a new influx of the divinity into the mind. Hence the thrill that attends it." [25] Confronted with disturbing variety, we often feel a tension from which a generalization, an abstraction, relieves us. It serves as a de-problemizer, aiding us to pass from an unstable, problematical, situation to a [fol. 78] more stable one. It satisfies a craving, meets what Emerson called "the insatiable demand of harmony in man," a demand which translates itself into the so-called "law" of "the least effort." [26] But the solution of a problem through the invention of a new generalization is no final solution: The new generalization breeds new problems. Stressing a newly perceived likeness between many particular happenings which had theretofore seemed unlike, it may blind us to continuing unlikenesses. Hypnotized by a label which emphasizes identities, we may be led to ignore differences. In all fields of thought this evil is encountered. Nowhere can it do more harm than in democratic government—and in democratic courthouse government in particular. For, with its stress on uniformity, an abstraction or generalization tends to become totalitarian

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1900-1918; and another nine from the period 1918-1929. See Report of the Attorney General Committee on Administrative Procedure (1941) 6-10.

[24] Patterson, loc. cit., 4.

One recalls Moliere's M. Jourdain who learned with pleasure, that, like literary men, he had been talking prose all his life.

[25] Emerson, *Circles*.

[26] Cf. Demogue, *Analysis of Fundamental Notions*, in *Modern French Legal Philosophy* (transl. 1916), 471; *Kallen, Art and Freedom* (1942) II, 708-710.

in its attitude towards uniquenesses.[27] While, then, the concept of "administrative law" is invaluable, because it pulls together for comparative study and common use, techniques and ideas developed in scattered areas of administrative action,[28] there is danger that that concept may yield inelastic uniformities. All administrators should not [fol. 79] be treated identically.[29] Yet the problem of the

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[27] If there is "an insatiable demand of harmony in man," there is also an insatiable human delight in individualities (particularities) which defy uniformity. We should revise Gilbert and say, "That every boy and every gal, "That's born into the world alive, Is *both* a little Liberal, and a little Conservative." The proportions vary in different persons and in the same person at different times.

[28] Thus the new administrative service of Pike & Fischer has already induced the divers administrative agencies to borrow from one another. The Secretary of Agriculture, for instance, recently cited an S. E. C. opinion concerning fairness in the interpretation of an administrative regulation; see *In Re Middletown Milk & Cream Co., Inc.*, 3 A. D. 84, referring to *Matter of Consumers' Power Co.*, 6 S. E. C. 444.

[29] "The problems subsumed by 'judicial review' or 'administrative discretion' must be dealt with organically; they must be related to the implications of the particular interests that invoke a 'judicial review' or as to which 'administrative discretion' is exercised. Therefore, a subject like 'judicial review,' in any scientific development of administrative law must be studied not only horizontally but vertically, e. g., 'judicial review' of Federal Trade Commission orders, 'judicial review' of postal fraud orders, 'judicial review' of deportation warrants. For judicial review in postal cases, for instance, is colored by the whole structure of which it forms a part, just as in land office cases, or in immigration cases, or in utility valuations, or in insurance license revocations, it derives significance from the nature of the subject matter under review as well as from the agency which is reviewed." Frankfurter, *Introduction to* Patterson, loc. cit. xvi-xvii.

As Patterson says (loc. cit. 4-5), "one cannot assume • • • that the same code of procedure which works well in workmen's compensation will do for the regulation of

delegated powers of a particular administrative officer is illuminated by the recognition that it is part of a general problem common to what Patterson refers to as the "pluralistic universe of administrative law." The illumination, however, has brought fear to some. The very word "delegation," when now coupled with the words "administrative [fol. 80] officers," strikes terror in their hearts. They re-

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insurance enterprises. As well apply the violent methods of military law to the taking of acensus!"

Dean Landis in 1938 referred to "the insistence of Mr. Justice Brandeis that differences in treatment should be accorded to findings of fact by different administrative officials, because of differences in the facts and in the qualities of the administrative to be expert in finding the facts." He also said: "If the extent of judicial review is being shaped, as I believe, by reference to an appreciation of the qualities of expertness for decision that the administrative may possess, important consequences follow. The constitution of the administrative and the procedure employed by it become of great importance. That these factors already in part mold the scope of judicial review is apparent from the decisions. Different agencies receive different treatment from the courts. A reputation for fairness and thoroughness that attaches to a particular agency seeps through to the judges and affects them in their treatment of its decisions." Landis, *The Administrative Process* (1938) 143-144, 153.

Previously, Henderson, in *The Federal Trade Commission* (1924) 337, had said: "The expert judgment of the Interstate Commerce Commission is, as I have said, respected by the courts, and the only reason I can think of for not giving the same treatment to the findings of the Federal Trade Commission is that it is difficult to tell from the great majority of the findings that the Commission has ever exercised an expert judgment, since the reasons for the decision are never given. Despite the dicta of the Supreme Court, I venture the opinion that the matter is not yet foreclosed, and that if it should appear in some future case that the Commission has based its decision on an expert judgment of a practical nature, the court is still in a position to state that it will not substitute its own judgment for the judgment of the Commission. So long as the Commission adheres to

semble the child who was horrified when his attention was called to the facts that his tongue was wet and his shoes full of feet. For delegation is a name for something that has always been present in society and always will be.[30] Perhaps the fright the label engenders can be reduced by observing that "discretion," which is familiar, is kin to "delegation." Almost boundless discretion has traditionally been conferred upon state and federal prosecuting officers to begin or not to begin proceedings of enforcement of some of the huge number of penal statutes (and against some rather than against other violators) and to "settle" such cases by [fol. 81] "bargain day" methods.[31] Wide, too, is the benefi-

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its present formal findings of fact, however, there can be little hope of such an outcome."

Recently the Supreme Court has shown signs of employing such an empirical, selective, test in its dealings with the several administrative agencies. Thus in *Dobson* v. *Commissioner*, 320 U. S. 489, 498, when announcing the extensive authority of the Tax Court in matters of "fact," the Court said: "It has established a tradition of freedom from bias and pressures." See, on the other hand, the increased strictness of the Court's attitude towards another agency in *Eastern-Central Ass'n* v. *U. S.*, 321 U. S. 194.

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[30] Consider, for instance, the powers delegated to cities and counties to enact ordinances; to private corporations to enact "by-laws" affecting their stockholders and persons dealing with them; and to public utility corporations to make regulations affecting thousands of consumers. Cf. Allen, *Law In The Making* (1927) Ch. XII.

[31] Cf. Wallace, *Nullification: A Process of Government*, 45 Pol. Sc. Q. (1930) 347.

In 1941, in hearings on S.674, S.675 and S.918, Senator O'Mahoney said to a witness: "Now the question as to whether or not there shall be a complete separation of prosecution and adjudication in all of these matters, and your position that they cannot possibly be joined in the same person without great detriment, prompts me to suggest, because of your statement a moment ago, that in the ordinary criminal procedure, day after day, prosecuting attorneys are confronted with the problem of determining whether or not they shall proceed with a particular case,

cent discretion of courts sitting in equity to relax stiff legal rules.[32] And the power of courts in general to interpret statutes has been said by some persons to be, in practical effect, a sort of supplementary legislation which the legislature necessarily leaves to the courts.

Indeed, those who today criticize the transfer of "subsidiary legislation" to administrative officers forget that, inspired by somewhat similar motives, there has been and still is much criticism of the power exercised by judges in construing statutes, that Bentham, Livingston, and their disciples (some even in our time[33]) have insisted that all "law" must emanate solely from the legislature, and have [fol. 82] tried, through codification, to destroy all "judicial legislation."[34] Repeated attempts on the European continent to exploit that notion have invariably proved disappointing.[35] Legal certainty to be attained by eliminating,

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and whether or not a particular type of settlement will be made. Prosecuting attorneys, U. S. attorneys, attorneys in the various districts, county attorneys, State attorneys and the like are constantly making these decisions which come within the border line * * *"

"In the Illinois Crime Survey of some dozen years ago, it was found that in a given year 13,117 felony prosecutions were begun in Chicago. Only 498—less than one in twenty-six—ever came to trial." Puttkammer, *Criminal Law Enforcement*, University of Chicago Law School, Reprint and Pamphlet Series (1941) No. 1, p. 6.

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[32] The hostility of the common law lawyers and judges to such discretion has often been compared with current hostile attitudes towards administrative agencies.

[33] Cf. Franklin, *The Judiciary State*, 3 Natl. Lawyers Guild Q. (1941) 26.

[34] See, e. g., the remarks of Edward Livingston and his colleagues in their preliminary report, in 1823, on the *Louisiana Civil Code, Legal Archives*, Vol. I, *A Republication of the Project of the Civil Code of Louisiana of 1825* (1937) xvii-xviii.

[35] See, e. g., Seagle, *The Quest For Law* (1941) Chapter XVIII.

via codification, all judicial law making is a fatuous dream.[36] Courts, in their interpretation of statutes often cannot avoid some such legislation. The enactment of many a statute thus, by implication, calls on the courts to engage in supplemental law making. That activity should always, of course, be modest in scope.[37] But the necessary generality in the wording of many statutes, and ineptness in the drafting of others, frequently compels the courts, as best they can, to fill in the gaps, an activity which, no matter how one may label it, is in part legislative.[38] Sagacious legal schol-

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[36] The notion of a "Ministry of Justice" or Law Revision Committee is another matter. See Stone and Pettee, *Revision of Private Law*, 54 Harv. L. Rev. (1940) 221.

[37] *Comm'r* v. *Beck's Estate*, 129 F. (2d) 243, 245-246 (CCA 2); *New England Coal & Coke Co.* v. *Rutland R. R. Co.*, — F. (2d) — (C. C. A. 2).

[38] The remark of Bishop Hoadly, usually quoted in discussions of judicial legislation—"Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law Giver to all intents and purposes, and not the persons who first spoke and wrote them" —has been given a specific application to statutory interpretation. That judicial legislation is an inherent part of the work of the courts in the development of legal rules when no statutes are involved has been avowed by at least eight Supreme Court Justices—Holmes, Hughes, Brandeis, Stone, Cardozo, Frankfurter, Douglas and Jackson: see citations in *New England Coal & Coke Co.* v. *Rutland R. R. Co.*, — F. (2d) —, note 31.

Many learned commentators have said the same; see, e. g., the citations in *Commissioner* v. *Beck's Estate*, 129 F. (2d) 243, 245, note 3; Waite, *Judge-Made Law And The Education of Lawyers*, 30 Am. Bar. Ass'n J. (1944) 253.

There has, however, been greater reluctance to admit that similarly, interpretation of statutes often requires such legislation. Yet it is difficult to justify a differentiation. Several students of continental legal systems have recognized that statutory construction often necessitates judge-made law. See Kiss, *Equity and Law, in The Science of Legal Method* (transl. 1917) 146; Lambert, *Codified and Case Law*, in the same volume, 251; Wurzel, *Juridical Thinking* (in the same volume), 286; Alvarez, *Methods For*

[fol. 83] ars of high repute, such as, for instance, John Chipman Gray, Wigmore, Allen and Radin, have said that courts, in discharging their duty of carrying out the express will of the legislature as faithfully as they can, are frequently unable to escape the responsibility of engaging in supplemental legislation.[39] As Chief Justice Hughes

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Codes (in the same volume) 429. As Mr. Justice Jackson recently noted, the Swiss Code candidly calls for such lawmaking by the judges; *State Tax Commission* v. *Aldrich*, 316 U. S. 174, 202, note 23.

Paul, *Federal Estate and Gift Taxation* (1942) I, 43-44, 62, 86-87, has observed that narrow or liberal construction of statutes often involves judicial legislation; cf. Jackson, *The Struggle For Judicial Supremacy* (1941) 58.

Seagle suggests that legislation actually leads to an increase of legislative activity by the courts. Seagle, *The Quest For Law* (1941) 298; cf. 196.

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[39] In *The Nature and Sources of Law* (2d ed. 1921) §370, Gray said "Interpretation is generally spoken of as if its function was to discover what the meaning of the legislature really was. But when the legislature has had a real intention, one way or another on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that the judge had to do with the statute, interpretation of the statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind had the point been present." He also said that "when the judges are professing to declare what the legislature meant, they are in truth themselves legislating to fill up" the gaps.

See Wigmore, *The Judicial Function, in The Science of Legal Method* (1917) xxvi; Allen, *Law in The Making* (1927) 283, 286-287; Radin, *The Law and Mr. Smith* (1938) Chapter XIV.

[fol. 84] said in 1928, "a federal statute finally means what the [Supreme] Court says it means."[40] Thus the courts in their way, as administrators in their way, perform the task of supplementing statutes. In the case of the courts, we call it "interpretation," or "filling in the gaps"; in the case of administrators we call it "delegation" to "supply the details." In both instances, the task is unavoidable.

There are those who, while they grudgingly concede the necessity of delegation of subordinate legislative powers to administrative officers, are disturbed because currently it is accompanied by what they consider an unwise breadth of authority in fact-finding given to such officers when deciding particular cases arising under administrative regulations.[40a] Such persons urge the courts to set narrow limits to the extent to which legislative powers may validly be assigned to administrators. But authority to find the facts is inseparable from the decision of specific cases.[40b] Judges trying non-jury cases have at least an equal breadth of authority in fact-finding. And extensive indeed it is, since, in the process of decision-making, the "minor" (fact) premise often plays a part as important as (if not more important than) the "major" (rule) premise.[41] (Recognizing that, where the testimony is in conflict, the deter-[fol. 85] mination of the facts by a trial judge involves a guess as to the accuracy and honesty of the witnesses, some commentators have, indeed, referred to the "discre-

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[40] Hughes, *The Supreme Court of the United States* (1928) 230.

[40a] Cf. Chief Justice Hughes, Address before Federal Bar Ass'n, quoted in N. Y. Times, February 13, 1931, p. 18; Bell, *Let Me Find the Facts*, 26 Am. Bar. Ass'n J. (1940) 552. See *U. S.* v. *Forness*, 125 F. (2d) 928, 942 (C. C. A. 2).

[40b] It should be noted, too, that the courts which issue rules of procedure subsequently apply them when particular cases arise involving those rules. And the effect of such rules is no light matter: failure to comply with them has cost many a man his life, liberty or property.

[41] "The major," said Burke, "makes a pompous figure in the battle, but the victory depends upon the little minor of circumstance."

tion of the judge" in the "estimation of the testimony."[42]) Appellate courts sometimes make greater demands of administrators as to precision and detail in fact-finding than they ordinarily do of trial judges sitting without a jury[43]—although it is an open secret that some federal trial judges who resent their own obligation in non-jury cases to make findings of fact express antipathy to the fact-finding powers vested in administrative officials. And upper courts always require far more of administrators than they do of juries: few administrators are permitted to return general (factless) verdicts.[44] The suggestion that appellate courts should, when reviewing administrative action, inquire more searchingly into the findings of administrators than they now do under the "substantial evidence" rule is difficult to reconcile with the practice of those courts in reviewing decisions of trial courts; moreover it would burden appellate courts impossibly unless the number of appellate judges were increased at least tenfold.[45] The truth is that much of the regulation of the affairs of citizens which the complexities of our civilization necessitates calls [fol. 86] for a very considerable use of the administrative device,[46] and that its use must be accompanied by grants

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[42] Such comments have been made concerning the position of the trial judge under modern trial procedure as contrasted with the previous continental procedure when proof was regarded quantitatively according to the age, sex and social position of the witnesses. See Millar, in Englemann, *History of Continental Civil Procedure* (transl. 1927) 41-49.

[43] Cf. dissenting opinion in *Eastern Central Ass'n* v. *U. S.*, 321 U. S. 194, 215.

[44] Some federal trial judges recently expressed indignation when it was suggested that the proposed rules of procedure in criminal cases should provide for fact-finding by a judge when trying a criminal case without a jury.

[45] Cf. Benjamin, *Administrative Adjudication in The State of New York* (1942) 336-338.

[46] By that device, advantages are gained which are not procurable by the judicial process, including inter alia, preventive action and decisions which citizens can procure in advance of action.

of delegated powers[47] both as to the making of rules and the finding of facts. Complexity is our lot and we should not rail against its inevitable concomitants.[48] Improvement in the procedures of administrative agencies and in their relations to the courts, when they judicially review administrative conduct, is desirable and possible.[49] The phrases "separation of powers" and "a government of laws, and not of men," if properly construed, embody principles of the first importance in a democracy; but if so construed as seriously to cripple effective government, they will lead to democracy's downfall, for, as the Federalist tells us, an ineffective government paves the way to anarchy and thence to despotism.[50] Laws neither execute nor interpret themselves. Men must discharge those functions. Above all what we need is the selection of well-trained, honest, able men, conscientiously obeying the laws, and imbued [fol. 87] with the spirit of democracy, to serve as administrators and on the bench.[51]

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[47] See 257 U. S. xxv-xxvi; Hughes, *Some Aspects of Development of American Law*, 39 N. Y. State Bar Ass'n Report (1916) 266, 269; Root, *Addresses on Citizenship and Government* (1916) 534.

[48] As Puttkammer says (loc. cit. 9), "we have altogether too much of a tendency to try to correct the abuse of administrative discretion by abolishing the discretion."

[49] Some of the expansion of administrative activities probably has resulted from backwardness in improving the fact-finding techniques of the courts. The success of the advisory role played by the S. E. C. in Chapter X cases under the Chandler Act suggests that in other contexts, administrative agencies could be used to better judicial fact-finding without departing substantially from judicial traditions. See *New England Coal & Coke Co.* v. *Rutland R. R. Co.*, — F. (2d) — note 30 (C. C. A. 2).

[50] *The Federalist* (Earle's ed. 1937) No. 70, p. 454; cf. No. 68, p. 444, and No. 51, p. 337.

[51] "To say that the quality of the people that administer your laws is unimportant, is, to my mind, ridiculous. The heart of the administrative problem is to get good administrators, or in the judicial problem, to get good judges. Now, there are certain laws that we must have to try to mitigate the effect of having bad men, either as judges or

Their selection, however, is not a judicial function. And it is surely not our function in this case to thwart the legislative purpose (whether we like it or not) by so interpreting this statute as to leave it, as to the industry here concerned, a mere bit of worthless printing.

Petitions denied.

L. HAND, *Circuit Judge* (concurring):

The only question which, as I view it, requires discussion is the meaning of § 8(f); for the plaintiffs' objections, based upon the Fifth Amendment, and—as applied to this situation—upon a supposed unlawful delegation of power, have long since been answered in the books. I should have not had any trouble as to § 8(f), had it applied to all wages—those fixed by statute as well as those fixed by "advisory [fol. 88] committees"—indeed, I am not sure that the Administrator would have needed any express grant of power to promulgate the regulation which he did, had the Act been silent. His duty might have included preventing evasions and safeguarding the rates in any event. But, since the power is in terms limited to what I may call "committee," as opposed to "statutory," wages, I have had some doubts whether we should construe it to comprise so drastic an exercise as is here in question. Indeed, unless it can be read to cover "statutory" wages, I do not believe that it would justify the proscription of a substantial part of the entire industry; for in that event the purpose we should

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administrators * * * If part of the furor that is aroused about these bills [to establish rules for administrative procedure] could be devoted to efforts to assure good appointments, I think we all would be better off." Senator O'Mahoney, loc. cit.

John Foster Dulles, in the same hearings, said that when he had publicly stated that the administration of any law depended in the last analysis upon the character of the men charged with the duty of administering it, he had been severely criticized "on the ground that that demonstrated I was a Nazi because I believed in a government by men and not a government of laws, and the American system was a government of laws and not of men."

Cf. Lindsay Rogers, *The Independent Regulatory Commissions*, 52 Pol. Sc. Q. (1937) 1, 9-10.

have to ascribe to Congress would be nothing short of absurd. The regulation was promulgated in August, 1943, and at most could cover less than two years, except for the possibility—remote in this industry—that an "advisory committee" might thereafter reduce wages below 40 cents under § 8(e). And yet the regulation will disorganize and make over the industry, break up much family economy, and produce conditions which cannot possibly adjust themselves until after it has itself ceased to exist when by hypothesis all will be free to go back to homework. Not only does every consideration which can support so heroic a remedy apply equally to "statutory" wages, but their exclusion so mutilates the only purpose that could have actuated the regulation, as to leave no intelligible purpose at all.

Even so, I should have had the utmost compunction in disregarding the explicit language with which the section begins, were it not for its legislative history. The grant of power appeared in the Senate bill in its present form, where it was part of an entirely different plan: a Board was to fix all labor standards. There were amendments in the Senate which I shall come back to in a moment; but, when the bill reached the House, the whole scheme was scrapped, and wages were fixed by statute. I do not understand that [fol. 89] in that phase, any power was given to the Administrator to protect the rates against evasion or to safeguard them; reliance being, perhaps, on his implied powers. In Conference a compromise was arranged, and a hybrid resulted; statutory rates were kept, but the Administrator had no power over them except a veto, and "advisory committees" were to fix them within prescribed limits. It was into this new plan, and into § 8, which set it up, that the power, as originally granted to the Administrator in the Senate, was reintroduced. Having had its origin in a plan which allowed wages to be fixed ad hoc, it took its place in that part of the act which still allowed them to be so fixed, though within limits. It was entirely natural that, when so introduced, the power should be thought of as limited to "committee" wages, forgetting its capricious and egregious incidence, if that were done. It does not therefore seem to me an undue liberty to give the section as a whole the meaning it must have had, in spite of the clause with which it begins. Such treatment of a statute needs no apology today, whatever were the scruples of the past. There is no surer way to misread any document than

to read it literally; in every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.

I have not mentioned the parenthesis, which was interpolated into what has now become § 8(f) while it was in the Senate, and which was deleted when it was restored. This grew up through step by step additions, among which "homework" was one. I think that we should misread it—built up in this way as it was—if we supposed that the [fol. 90] process indicated more than a desire to make sure that the specified details should be included. Indeed, even though the whole parenthesis had been struck out while the original plan remained, I should have put it down to the belief that it was unwise to specify so much, lest the specification be taken as exhaustive. But that did not happen; the section, which had apparently died with the Senate plan, was lifted out of that setting, and was put into the compromise bill as it had stood originally. It would be indeed a far cry to infer from that that all the items which by accretion had made their way into the parenthesis were in this way excised from the Administrator's powers. Indeed, if so—as he argues—he could not even regulate labels, for, although § 11(c) gives him power over records, it does not give him power over these.

Finally, I cannot see that the Puerto Rico and Virgin Island amendment to §6 stands in the way. When the Act was first passed it was not in it; it remained for two years just as it was. It would be unsafe to interpret the original meaning by an amendment made two years later; certainly, when it was a specific and detailed provision, applicable to islands where the conditions were quite different from those in the continental United States.

SWAN, *Circuit Judge* (dissenting):

These are petitions under section 10 of the Fair Labor Standards Act of 1938, 29 USC §210, by home workers and employers of home workers in the embroideries industry to

review a wage order of the Administrator which establishes a minimum wage rate of 40 cents an hour and prohibits, with very limited exceptions, home work. No one questions the validity of the minimum wage portion of the order. My brothers hold valid the prohibition of home work. I shall [fol. 91] attempt to state briefly the reasons why I cannot agree with them.

Section 5 of the Act provides for the appointment by the Administrator of industry committees, each such committee being composed of representatives of the public, of employees and of employers in the industry. Section 8 prescribes the duties of the committee and of the Administrator after the committee has filed a report containing its recommendations. Subsection (b) requires that after investigating conditions in the industry the committee "shall recommend to the Administrator the highest minimum wage rates for the industry which it determines * * * will not substantially curtail employment in the industry." Under subsection (c) the committee may recommend classifications within the industry but the wage it recommends must not "substantially curtail employment in such classification," nor give a competitive advantage to any group in the industry. After the committee files a report containing its recommendations the Administrator must give a hearing to interested persons and shall by order carry the recommendations into effect, if he finds that they are lawful and supported by the evidence adduced at the hearing, and, "taking into consideration the same factors as are to be considered by the industry committee," will carry out the purposes of section 8; otherwise he must disapprove such recommendations and again refer the matter to the same or another industry committee for further consideration and recommendation. Subdivision (d). Subdivision (e) provides that no order issued under section 8 shall remain in effect after expiration of the statutory rates specified in section 6. Then follows subdivision (f) under which the Administrator claims his power to prohibit home work. It reads as follows:

> "Orders issued under this section shall define the industries and classifications therein to which they are [fol. 92] to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry

out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. * * *"

The committee which recommended the 40 cent minimum wage for the embroideries industry made no recommendation as to the abolition or restriction of home work. This issue was never presented to the committee. Had the committee known that the wage it recommended was to be accompanied by such a restriction, which, as Judge Hand well says, "will disorganize and make over the industry, break up much family economy, and produce conditions which cannot possibly adjust themselves" for a considerable period of time, the committee might well have withheld its recommendation of a minimum wage rate lest employment in the industry be substantially curtailed. The Administrator, it is true, has made a finding that employment will not be substantially curtailed. But this finding adds no support to the validity of the order in my opinion. The issue of curtailment of employment by reason of the prohibition of home work was interjected without statutory authority into the hearing held under §8(d). That hearing is to determine whether the committee's recommendations are made in accordance with law, are supported by the evidence, and will carry out the purposes of the section, "taking into consideration the same factors as are required to be considered by the industry committee." As already noted the prohibition of home work was not presented to the committee and consequently was not a factor considered or required to be considered by it. Bearing in mind that under section 8(d) the Administrator must either adopt or reject the recommendations of an industry committee and is given no discretion to modify them, and that such committee is repeatedly ad- [fol. 93] monished to determine that its recommendations will not substantially curtail employment, it appears to me unreasonable to suppose that Congress intended the incidental powers conferred by section 8(f) to authorize the Administrator in his uncontrolled discretion to take action so radical as to alter the whole structure of an industry and cause one-third of the employees engaged therein to become factory workers or to give up their employment. In my opinion "such terms and conditions" as the Administrator finds necessary "to carry out the purposes of the order or

prevent evasion thereof" mean terms and conditions which are truly incidental to administration, that is, requirements as to keeping records, filing reports, etc. And this finds confirmation, I think, in the fact that the Act as finally passed omitted the parenthetical definition which appeared at one stage of the legislative history of section 8(f), namely, "such terms and conditions (including the restriction or prohibition of industrial home work or of such other acts or practices) as the Board finds necessary to carry out the purposes of such order * * *." In my opinion so much of the order as prohibits home work should be set aside.

[fol. 94] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 18973

JOSEPHINE GUISEPPI, DOMINICA DE MARCO, ROSA MORICI, Anthony Cimilluca, individually and trading as Cimi Embroidery Co.; Simon Federman, individually and trading as Efficiency Novelty Works, and Frank Jannotti, individually and trading as Parisian Art Embroidery, Petitioners,

v.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.

This Court having rendered its decision on June 27, 1944, Hon. Thomas W. Swan dissenting, in the above entitled cause holding that the Wage Order for the Embroideries Industry, issued by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 8 of the Fair Labor Standards Act on August 21, 1943, published in the Federal Register on September 2, 1943, should be affirmed;

It Is Hereby Ordered, Adjudged And Decreed that the said Wage Order for the Embroideries Industry, issued by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 8 of the Fair Labor Standards Act on August 21, 1943, and pub-

lished in the Federal Register on September 2, 1943, be, and it hereby is, in all respects affirmed.

Dated: New York, N. Y., 27 —, 1944.

Learned Hand, Jerome N. Frank, Circuit Judges.

Filed July 27, 1944.

[Endorsed:] United States Circuit Court of Appeals: Second Circuit. Josephine Guiseppi, et al., v. L. Metcalfe Walling, Administrator, etc., Order. United States Circuit Court of Appeals: Second Circuit. Filed July 27, 1944. Alexander M. Bell, Clerk.

[fol. 95] United States Circuit Court of Appeals for the Second Circuit

No. 18976

Mildred Maretzo, et al., Petitioners,

v.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.

This Court having rendered its decision on June 27, 1944, Hon. Thomas W. Swan dissenting, in the above entitled cause holding that the Wage Order for the Embroideries Industry, issued by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 8 of the Fair Labor Standards Act on August 21, 1943, published in the Federal Register on September 2, 1943, should be affirmed;

It Is Hereby Ordered, Adjudged And Decreed that the said Wage Order for the Embroideries Industry, issued by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 8 of the Fair Labor Standards Act on August 21, 1943, and published in the Federal Register on September 2, 1943, be, and it hereby is, in all respects affirmed.

Dated: New York, N. Y., 27 —, 1944.

Learned Hand, Jerome N. Frank, Circuit Judges.

Filed July 27, 1944.

[Endorsed:] United States Circuit Court of Appeals: Second Circuit. Mildred Maretzo, et al., v. L. Metcalfe Walling, Administrator, etc., Order. United States Circuit Court of Appeals: Second Circuit. Filed July 27, 1944. Alexander M. Bell, Clerk.

[fol. 96] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 18986

GEMSCO, INC., VANGUARD MILITARY EQUIPMENT CO., S. MARS, INC., Hertz & Company, Tubell & Company, Hilborn-Hamburger, Inc., and G. Hirsch Sons, Inc., Petitioners,

v.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.

This Court having rendered its decision on June 27, 1944, Hon. Thomas W. Swan dissenting, in the above entitled cause holding that the Wage Order for the Embroideries Industry, issued by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 8 of the Fair Labor Standards Act on August 21, 1943, published in the Federal Register on September 2, 1943, should be affirmed;

It Is Hereby Ordered, Adjudged And Decreed that the said Wage Order for the Embroideries Industry, issued by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 8 of the Fair Labor Standards Act on August 21, 1943, and published in the Federal Register on September 2, 1943, be, and it hereby is, in all respects affirmed.

Dated: New York, N. Y., 27 —, 1944.

Learned Hand, Jerome N. Frank, Circuit Judges.

Filed July 27, 1944.

[Endorsed:] United States Circuit Court of Appeals: Second Circuit. Gemsco, Inc., et al., v. L. Metcalfe Walling, Administrator, etc., Order. United States Circuit Court of Appeals: Second Circuit. Filed July 27, 1944. Alexander M. Bell, Clerk.

[fol. 97] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 18984

JOSEPHINE GUISEPPI, et al., Petitioners,

against

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.

No. 18985

MILDRED MARETZO, et al., Petitioners,

against

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.

No. 18986

GEMSCO, INC., et al., Petitioners,

against

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.

It Is Hereby Stipulated And Agreed by and between the attorneys for all of the petitioners herein and the attorneys for the Administrator of the Wage and Hour Division of the United States Department of Labor, that the above entitled proceedings be consolidated and be deemed to be [fol. 98] one proceeding as hereinbefore entitled; and it is

Further Stipulated And Agreed that the petitioners apply to the United States Circuit Court of Appeals for the Second Circuit for an order directing that the record on file herein be removed to the Supreme Court of the United States, which record shall thereupon be deemed to be the record of the said consolidated proceeding and as such be forwarded to the Clerk of the Supreme Court of the United States except that only the following portions of the record shall be printed by the petitioners both for

the purpose of the application of the petitioners herein to the Supreme Court of the United States for a Writ of Certiorari and (if granted) for the purposes of the appeal to the Supreme Court of the United States: The Appendix to the brief of appellants, Gemsco, Inc., et al, and the administrator's Regulations applicable to the employment of Industrial Homeworkers in the Embroideries Industry (pages 140 to 148 inclusive of the Joint Appendix to Briefs of Appellants, Guiseppi, et al, and Maretzo, et al) and pages 7 and 8 of the reply brief submitted on behalf of appellants, Guiseppi, et al, together with the Petitions [fol. 99] for Review herein and the Opinion and Order of the United States Circuit Court of Appeals for the Second Circuit.

In the event that the petitions for certiorari are granted, the full transcript of the proceedings before the Administrator of the Wage and Hour Division of the United States Department of Labor, filed in the Circuit Court of Appeals for the Second Circuit, shall be, and be deemed to be, the record on appeal in the Supreme Court and said record need not be printed, except as hereinabove set forth.

Dated: New York, N. Y., July 27, 1944.

Douglas B. Maggs, Solicitor; Archibald Cox, Associate Solicitor; Louis Sherman, Assistant Solicitor, and Irving Rozen, Regional Attorney, United States Department of Labor, Attorneys for Respondent.

Landau & Friedman, Attorneys for Petitioners-Appellants, Guiseppi, et al.; Brower, Brill & Tompkins, Attorneys for Petitioners-Appellants, Maretzo, et al.; Weisman, Quinn, Allan & Spett, Attorneys for Petitioners-Appellants, Gemsco, Inc., et al.

[Endorsed:] Giuseppi, et al., v. Walling. United States Circuit Court of Appeals, Second Circuit. Filed July 28, 1944. A. M. Bell, Clerk.

[fol. 100] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from I to L and 1 to 227, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Josephine Guiseppi, et al., Petitioners-Appellants, against L. Metcalfe Walling, as Administrator of the Wage and Hour Division, United States Department of Labor, Respondent (And two other cases) as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of July, in the year of our Lord one thousand nine hundred and forty-four, and of the Independence of the said United States the one hundred and sixty-ninth.

Alexander M. Bell, Clerk. (Seal.)

[fol. 252] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 368

ORDER ALLOWING CERTIORARI—Filed October 16, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the first question presented by the petition for the writ and the case is advanced and assigned for argument on Monday, December 4th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 253] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 369

ORDER ALLOWING CERTIORARI—Filed October 16, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the first question presented by the petition for the writ and the case is advanced and assigned for argument on Monday, December 4th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 254] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 370

ORDER ALLOWING CERTIORARI—Filed October 16, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the first question presented by the

petition for the writ and the case is advanced and assigned for argument on Monday, December 4th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 48,821, 48,822, 48,823. U. S. Circuit Court of Appeals, Second Circuit. Term No. 368. Gemsco, Inc., et al., Petitioners, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor. Term No. 369. Mildred Maretzo, et al., Petitioners, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor. Term No. 370. Josephine Guiseppi, et al., Petitioners, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor. Petition for writs of certiorari and exhibit thereto. Filed August 18, 1944. Term No. 368 O. T. 1944. 369 O. T. 1944. 370 O. T. 1944.